fundamental rights reach the Court, we must identify a consistent standard that equally protects the people's fundamental rights.

A. An Outdated Standard

The strict scrutiny standard of review was established in 1938, thirty-three years after the *Jacobson* decision.[52] In an unassuming footnote, the Supreme Court wrote that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth," establishing the most rigorous standard of judicial review.[53] Today, this standard of review is applied to both constitutional rights, such as the free exercise of religion,[54] and fundamental rights as identified by the court, such as the right to privacy.[55] Fifty-four years after *Carolene Products* (and eighty-seven years after *Jacobso*n), the Supreme Court established the undue burden standard in *Planned Parenthood v. Casey*, which held that laws which impose an undue burden upon a fundamental right, like abortion, are unconstitutional.[56]

Both strict scrutiny and undue burden standards of the review were developed as mechanisms to protect the rights conferred by the Constitution. These standards aim to prevent superfluous state interference with individual constitutional rights, which comes into tension with the broad police power of the *Jacobson* era. Now that we face a pandemic similar to the public health threats of *Jacobson*'s time, but have stronger mechanisms of constitutional review,

[52] United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).
[53] *Id.*
[54] U.S. CONST. amend. I.
[55] Roe v. Wade, 410 U.S. 113 (1973).
[56] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

how do we reconcile the two? We could allow the courts to continue varied interpretations through a precedential shadow docket that mirrors greater debates on fundamental rights. However, our justice system aims for fairness and the law ought to be clear.[57] As the new, stronger strains of the COVID-19 virus plague the nation and the world, a return of strict lockdowns may bring new litigation. Additionally, as the incidence of the pandemic and unknown viral agents increase,[58] this question needs to be grappled with now.

B. Establishing a New Standard

The courts have used *Jacobson* to find religious bans unconstitutional while finding abortion bans constitutional. The result is a seemingly inconsistent application of the doctrine, as executive orders in both contexts have restricted and/or eliminated constitutional rights. This disconnect stems from the level of deference courts give state police power under *Jacobson*, and the level of subsequent analysis they are willing to engage in.[59] To avoid anachronistic applications of the *Jacobson* legal standard going forward, and to promote consistency in the law, a clear test is needed.[60]

The free exercise of religion is protected by the First Amendment.[61] The Free Exercise Clause does not, however, require a state to accommodate religious functions or to exempt them from generally applicable laws.[62] Furthermore, a neutral law of general applicability that

[57] David F. Levi, Dir., Bolch Jud. Inst, Keynote Address at the Rendell Center for Civics and Engagement Symposium: Fair and Impartial Judiciary (Oct. 26, 2019), https://judicialstudies.duke.edu/2019/11/what-does-fair-and-impartial-judiciary-mean-and-why-is-it-important, ("[F]air and impartial courts are essential to a successful democracy.").
[58] Jared P. Cole, *Federal and State Quarantine and Isolation Authority*, CONG. RSCH SERV. (Oct. 9, 2014). ("In the wake of increasing fears about the spread of highly contagious diseases, federal, state, and local governments have become increasingly aware of the need for a comprehensive public health response to such events.").
[59] *See supra* Part I.B, I.C.
[60] Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 CONLAWNOW 39, 40-43 (2020).
[61] U.S. CONST. amend. I.
[62] *See, e.g.*, Employment Division v. Smith, 494 U.S. 872 (1990).

incidentally burdens religions does not violate the Free Exercise Clause.[63] Any law that is not neutral and generally applicable must survive strict scrutiny review.[64] Strict scrutiny requires the state to show a compelling government interest and that the challenged action is narrowly tailored to achieve that interest.[65] Abortion rights are reviewed under the *Casey* undue burden standard.[66] *Jacobson* states that "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."[67]

Jacobson was decided in 1905 before the tests of strict scrutiny and undue burden were developed. How can we, in good faith, use old doctrine to supersede our modern constitutional standards of review? I argue that we cannot, and therefore ought to infuse the doctrines in an effort to modernize *Jacobson* thereby securing fundamental rights in light of COVID-19 and any future threats to the public health.[68]

There is no doubt that State police power exists in a pandemic. *Jacobson* proscribes the state government's power to regulate in the public health interest during a public health crisis. As the United States struggled to contain the COVID-19 pandemic, many states issued executive orders (EO) placing restrictions on abortion access and religious services. Both are protected constitutional, fundamental rights, yet *Jacobson* has been applied differently across judges and

[63] *Id.* at 880.
[64] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993).
[65] Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 75, 75 (2017).
[66] June Medical Services v. Russo, 140 S. Ct. 2103 (2020).
[67] Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905).
[68] Denver Bible Church v. Azar, 494 F. Supp. 3d. 816, 829 (D. Colo. 2020), *appeal dismissed sub nom*. Church v. Polis, No. 20-1377, 2020 WL 9257251 (10th Cir. Dec. 23, 2020) ("[W]hile an emergency might provide justification to curtail certain civil rights, that justification must fit within the framework courts use to evaluate constitutional claims in non-emergent times.").

justices when it comes to these issues. In an abortion context, circuits are split on balancing the constitutional right to abortion with state power, with two circuits finding that EO's abortion rules cannot stand under *Jacobson* and two circuits finding that they can. In a religious context, some circuits and Supreme Court Justices have found that restrictions on religious worship are neutral restrictions and therefore constitutional, while others held that such restrictions are not at all neutral, and therefore violate the Constitution.

I argue that the substantial relation and invasion of rights prongs of *Jacobson's* inquiry must be considered within the constitutional right's current-day standard of review. *Jacobson* ought not to be applied on top of constitutional standards of review, but instead infused into them**.** The Supreme Court's framework for reviewing constitutional challenges to state actions, taken in response to a public health crisis, must still pass the highest level of scrutiny that right confers in modern day.

Where a free exercise restriction is a general law of neutral applicability, the *Jacobson* standard would remain as is, because there is no modern standard of review which supersedes it. However, when a case requires strict scrutiny or undue burden analysis, *Jacobson* cannot usurp the modern, heightened standards of review. As the inquiry concerns fundamental rights, courts must question the wisdom and efficacy of the measures.[69] That is to say, a court may not refuse to analyze the rule (and the reasons for the rule) in deference to the state.[70] While *Jacobson* still serves as the baseline case law for state police power, it must be explicitly considered in tandem with the respective modern constitutional standards of review. The courts should not have

[69] *Cf.* 954 F.3d 772, 785 (5th Cir. 2020).
[70] *Compare In re* Abbott, 954 F.3d 772, 785 (5th Cir. 2020) ("[C]ourts may not second-guess the wisdom or efficacy of the measure."), *with id.* at 801 (Dennis, dissenting) ("[T]he [*Jacobson*] Court clearly anticipated that courts would exercise judicial oversight over a state's decision to restrict personal liberties during emergencies."), *and* Robinson v. Att'y Gen., 957 F.3d 1171, 1179 (11th Cir. 2020) ("[W]hile states and the federal government have wide latitude in issuing emergency orders to protect public safety or health, they do not have carte blanche to impose any measure without justification or judicial review.).

discretion in how, when, and with how much deference they give to *Jacobson* and the Constitution.

C. Applying the New Standard

To illustrate how this modernized *Jacobson* standard would apply, let us reconsider the abortion access case *In re Abbott* from the Fifth Circuit.[71] *In re Abbott* considers a Texas executive order (GA-09) which restricted access to abortion. The text of the order read:

> "[A]ll licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death…."[72]

The Texas Attorney General followed GA-09 with an announcement that health care providers, including abortion providers, must immediately stop all medically unnecessary surgeries and procedures to preserve resources to fight the COVID-19 pandemic.[73]

As this is an abortion access case in a public health crisis, the governing standards are *Jacobson* and *Casey*. Using the outdated *Jacobson* analysis, the majority in *In re Abbott* considered the substantial relation prong first. This *Jacobson* prong aligns with the first *Casey* inquiry: valid state interest. The Fifth Circuit found GA-09 to be a "valid emergency response to

[71] 954 F.3d 772, 785 (5th Cir. 2020).
[72] Tex. Exec. Order No. GA-09 (Mar. 22, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf.
[73] Complaint for Injunctive and Declaratory Relief, Planned Parenthood v. Abbott, 2020 WL 1465781 (W.D.Tex. 2020) (No. 1:20-cv-323); *see also AG Paxton Files Brief to Enforce Governor's Executive Order Halting Unnecessary Medical Procedures, Including Abortions*, ATT'Y GEN. OF TEX. (March 30, 2020), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-files-brief-enforce-governors-executive-order-halting-unnecessary-medical-procedures.

the COVID-19 pandemic" without questioning if the laws went beyond the necessities of the case.[74] However, under the new test, the court would need to look more critically at the measures to ensure the state's exercise of police power does not go beyond necessity nor violate the rights secured by the constitution.[75] Upon such analysis, the court would find that the regulations are not substantially related to the state's goals.[76] In fact, the regulations do not lead to the state's goal and may even exacerbate the problem.[77] Therefore, under the modern *Jacobson* analysis GA-09 is not substantially related to the public health crisis.

Turning to the second *Jacobson* prong, the Fifth Circuit found that "GA-09 merely postpones certain non-essential abortions, an emergency measure that does not plainly violate *Casey* in the context of an escalating public health crisis."[78] It reasoned that GA-09 was not an outright ban, and therefore "[could] not be affirmed to be, beyond question, in palpable conflict with the Constitution."[79] It further based acceptance of GA-09 upon the fact that "*Jacobson* disclaimed any judicial power to second-guess the policy choices made by the state in crafting emergency public health measures."[80] As the modern standard makes clear, it is the duty of the

[74] *In re Abbott*, 954 F.3d at 787; *Compare id.* at 785 ("[C]ourts may not second-guess the wisdom or efficacy of the measures."), *with Jacobson v. Massachusetts* 197 U.S. 11, 29 (1905) (noting that the court may hold a law invalid when it goes "beyond the necessity of the case, and under the guise of exerting a police power. . . violate[s] rights secured by the Constitution.").
[75] 954 F.3d at 800 ("Courts have a duty to review a state's exercise of their police power where the state's action [ ] goes 'beyond the necessity of the case, and, under the guise of exerting a police power ... violate[s] rights secured by the Constitution. . . .'" (Dennis, dissenting) (internal citation omitted).
[76] The state aims to alleviate the shortage of doctors, nurses, hospitals beds, medical equipment, and personal protective equipment (PPE). *Id.* at 779.
[77] *See, e.g.*, *id.* at 802 ("Procedural abortions in Texas are single-day procedures that, unlike surgeries, require no hospital bed, incision, general anesthesia, or sterile field. . . . Medication abortions, which involve only taking medications by mouth, require no PPE to administer the medication. . . . Moreover,. . .PPE conservation argument[s]mistakenly assume[] that a patient unable to obtain an abortion will not otherwise need medical care that requires the consumption of PPE.") (Dennis, dissenting); *see also* Adams & Boyle, P.C. v. Slatery 455 F. Supp. 3d 619, 628 (M.D. Tenn.), *aff'd as modified*, 956 F.3d 913 (6th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 1262 (2021) ("[P]rocedural abortion uses less PPE and involves significantly less patient interaction than carrying a pregnancy to term and giving birth. In addition, plaintiffs state that women may travel out-of-state to obtain an abortion while EO-25 is in effect, risking infection of COVID-19 and transmission to others when they return.").
[78] *Id.* at 788.
[79] *Id.* (citation omitted).
[80] *Id.* at 784.

courts to ensure fundamental rights are not infringed upon. Therefore, under the modern *Jacobson* standard, the courts must *analyze* GA-09 under the invasion of rights and undue burden prongs. If the Fifth Circuit had done this, it would have found that the GA-09, which was likely to extend past its proposed expiration,[81] unduly delayed or eliminated a pregnant person's ability to have an abortion.[82] Under the modern *Jacobson* analysis, GA-09 fails both the substantial relation and invasion of rights prong and would therefore be held invalid.

CONCLUSION

In the COVID-19 abortion bans context, *Jacobson* is applied as an absolute right of state police power in some circuits, and as a basis for showing imposition on a plain and palpable invasion of rights secured by the fundamental law in others. In a religious context, *Jacobson* is applied as outdated and inapplicable to discriminatory religious bans by some, and a valid exercise of a neutral ban and state police power by others. A disagreement lies concerning whether there is a real or substantial relation to protecting public safety and if it is beyond all question, a plain, palpable invasion of rights secured by the fundamental law.

While it is certainly true that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people to the politically accountable officials of the States 'to guard and protect,'"[83]

[81] *See* Complaint for Injunctive and Declaratory Relief, Planned Parenthood v. Abbott, 2020 WL 1465781 (W.D. Tex. 2020) (No. 1:20-cv-323); *see also Slatery*, 956 F.3d at 922 (6th Cir. 2020), *cert. granted*, *judgment vacated*, 141 S. Ct. 1262, 209 L. Ed. 2d 6 (2021) ("[T]he district court emphasized that [] EO-25 was 'likely' to last past April 30.").

[82] *See In re Abbott* 954 F.3d at 785 ("[P]rohibiting abortions for patients whose pregnancies will, before the expiration of GA-09, reach or exceed twenty-two weeks, the gestational point at which abortion may no longer be provided in Texas, represents "a plain, palpable invasion of rights secured by the fundamental law." (Dennis, dissenting) (quoting *Jacobson*, 197 U.S. at 31); *see also Slatery*, 956 F.3d at 922 ("[B]ecause EO-25 was 'likely' to last past April 30, and because '[d]elaying a woman's access to abortion even by a matter of days can result in her having to undergo a lengthier and more complex procedure that involves progressively greater health risks ... or can result in her losing the right to obtain an abortion altogether,' the Plaintiffs were likely to succeed on the merits of their constitutional claim, per the *Casey* 'undue burden' test.").

[83] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (Roberts, J., dissenting).

it is also true that "the Constitution [] entrusts the protection of the people's rights to the Judiciary."[84] When courts refuse to second guess the state, they may fail to protect the people's rights. When courts inconsistently apply decades-old police power doctrine to modern questions of constitutional rights, they endanger trust in our judicial system. Moreover, when these decisions are made behind closed doors and without explanation on the shadow docket, they exacerbate confusion for the people while creating lasting precedent on deeply political issues. If anything demonstrates this in recent years, it is the COVID-19 litigation surrounding the constitutional rights to abortion and religious liberty. As courts deal with conflict between government authority and fundamental rights on a larger scale, these COVID-19 litigations serve as helpful case studies. Abortion access and religious liberty rights serve a similar anti-totalitarian purpose in our society and should be protected equally in the face of a public health crisis.

As we begin to recover from the pandemic, reflection and analysis on these cases shows us that a clear standard must be applied. Judges and justices should not be able to choose the level of deference they give *Jacobson* or freedom they give state government, based on the constitutional right in question. Such approaches privilege some rights over others based on seemingly political leanings, which the judiciary must aim to avoid. Protecting the right to abortion as equally as protecting religious liberty, while still allowing states to protect the public health is the duty of the courts. Balancing the rights of the people with the rights of state government requires clarity and consistency. To achieve this, *Jacobson* must be infused into modern standards of review for violations of constitutional rights.

[84] S. Bay United Pentecostal Church v. Newsom, No. 20A136, 2021 WL 406258 (U.S. Feb. 5, 2021) (Roberts, J., concurring).

Applicant Details

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Date of BA/BS	**May 2013**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 26, 2016**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Harvard Journal of Law & Public Policy**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Massachusetts, New York**

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Specialized Work Experience

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May 17, 2023

The Honorable Paul B. Matey
United States Court of Appeals
Third Circuit
Martin Luther King, Jr. Federal Building and
United States Courthouse
50 Walnut Street, Room 5040
Newark, NJ 07102

Dear Judge Matey:

I am writing to apply for a clerkship in your chambers for the 2026-2027 term. I graduated from Harvard Law School in 2016 and am currently working as an associate at Greenberg Traurig LLP in Seoul. Attached are my resume, law school grade sheet, and writing sample. You will be receiving letters of recommendation from the following people.

Prof. Christine Desan	Arie Eernisse	Rockey Yoo
desan@law.harvard.edu	aeernisse@gmail.com	rockeyy@gmail.com
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Magistrate Judge Marianne B. Bowler of the United States District Court for the District of Massachusetts has also agreed to serve as a reference and may be reached at (617) 748-4101.

As you will see from my resume, I returned to South Korea immediately upon graduation to fulfill my military duty. After completing my military service as a JAG officer, I have been practicing international arbitration in Seoul while awaiting my Green Card to be approved. The approval finally came last month, and I am seeking to relocate to New Jersey.

I hope to bring a unique perspective to the important issues that your chambers will have to decide, together with the lessons learned during my externship with Judge Bowler. I would be honored to serve as your law clerk and am available at your convenience for an interview.

Thank you for your time and consideration.

Very truly yours,

Jung Hoon Yang

Enclosures

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EDUCATION

Harvard Law School, Cambridge, MA
J.D. May 2016
Harvard Journal of Law & Public Policy, Senior Editor
Admitted in New York and Massachusetts January & March 2017

Bernard M. Baruch College, New York, NY
B.A. Political Science May 2013
Worked 40-45 hours per week all four years as legal assistant

EXPERIENCE

Greenberg Traurig LLP, Seoul, Republic of Korea
Associate 2023-Present
Specialize in international arbitration and litigation. Responsibilities include case management; legal research; drafting memorials; and hearing preparation.

Shin & Kim LLC, Seoul, Republic of Korea
Foreign Attorney 2021-2023
Represented sovereign and corporate clients in international arbitration and litigation before variety of fora. Examples of representations:

- ISDS/International Commercial Arbitration:
  - Represented Korean national energy corporation against Indian government concerning greenfield gas-based power plant.
  - Represented Korean government against U.S. consulting firms concerning breach of confidentiality obligations in relation to WTO dispute with Japan;
  - Represented major industrial company in construction dispute concerning first-of-its-kind automated logistics facility;
  - Represented Korean state-owned bank against group of commodity traders in financing dispute arising out of multiple receivables purchase agreements.
- Cross-Border Matters:
  - Represented Korean national oil corporation in submitting bankruptcy petition in the Netherlands.

Republic of Korea Air Force, Seoul, Republic of Korea
Judge Advocate Officer 2018-2021
Reviewed international agreements with foreign military organizations. Supported senior officials and subordinate organizations re. regulatory compliance. Assessed legality of various military operations. Reviewed internal regulations and policies.

KTK Academy, Inc., Seoul, Republic of Korea
In-House Counsel / Temporary Position while Awaiting Military Conscription 2016-2018
Provided general day-to-day business and legal advice.

LANGUAGE Fluent in Korean.

INTERESTS Basketball and watching movies directed by Christopher Nolan.

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Record of: Jung Hoon Yang
Current Program Status: Graduated
Degree Received: Juris Doctor May 26, 2016
Pro Bono Requirement Complete

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JD Program

Fall 2013 Term: September 03 - December 20

1000	Civil Procedure 3 Desan, Christine	P	4
1001	Contracts 3 Abrams, Howard	P	4
1006	First Year Legal Research and Writing 3A Morley, Michael	P	2
1004	Property 3 Mann, Bruce	P	4
1005	Torts 3 Roin, Benjamin	P	4
	Fall 2013 Total Credits:		18

Winter 2014 Term: January 06 - January 24

1007	Problem Solving Workshop E Fried, Charles	CR	2
	Winter 2014 Total Credits:		2

Spring 2014 Term: January 27 - May 16

1012	Comparative Law: Why Law? Lessons from China Alford, William	P	4
1002	Criminal Law 3 Steiker, Carol	P	4
1006	First Year Legal Research and Writing 3A Morley, Michael	P	2
2389	Legal Thought Now: Law and the Structure of Society Unger, Roberto	P	2
1003	Legislation and Regulation 3 Barron, David	P	4
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	Total 2013-2014 Credits:		36

Fall 2014 Term: September 02 - December 19

2023	Child, Family and State Bartholet, Elizabeth	P	3
2048	Corporations Ramseyer, J. Mark	P	4
2079	Evidence Schulman, Emily	P	4
7007W	Writing in Conjunction with Summer Work Experience Desan, Christine	P	1
	Fall 2014 Total Credits:		12

Winter 2015- Spring 2015 Term: January 05 - May 14

8099	Independent Clinical - Judge Marianne B. Bowler Desan, Christine	CR	5
	Winter 2015- Spring 2015 Total Credits:		5

Spring 2015 Term: January 26 - May 14

2035	Constitutional Law: First Amendment Feldman, Noah	P	4
2036	Constitutional Law: Separation of Powers, Federalism, and Fourteenth Amendment Feldman, Noah	P	4
2050	Criminal Investigations / Police Practices: Fourth, Fifth and Sixth Amendments Chacón, Jennifer	P	3
2740	The Prison Industry and Criminal Justice Incentives Eisenberg, Avlana	CR	1
	Spring 2015 Total Credits:		12
	Total 2014-2015 Credits:		29

Fall 2015 Term: September 02 - December 22

2069	Employment Law Sachs, Benjamin	P	4
2192	Natural Law and Positive Law Sargentich, Lewis	CR	1
2234	Taxation Desai, Mihir * Dean's Scholar Prize	H*	4
7007W	Writing in Conjunction with Summer Work Experience Desan, Christine	H	1
	Fall 2015 Total Credits:		10

Winter 2016 Term: January 04 - January 22

2249	Trial Advocacy Workshop Sullivan, Ronald	CR	3
	Winter 2016 Total Credits:		3

continued on next page

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May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
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2049	Criminal Procedure: Adjudication Kavanaugh, Lisa	P	3
2169	Legal Profession Sawyer, Logan	P	3

Spring 2016 Total Credits:	11
Total 2015-2016 Credits:	24
Total JD Program Credits:	89

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SHIN&KIM

14 May 2023

Dear Judge:

I write this letter in support of Mr. Jung Hoon Yang's application for a judicial clerkship. I enjoyed working with Jung Hoon for most of the past two years while he was an associate foreign attorney at Shin & Kim in Seoul, South Korea. I highly recommend Jung Hoon for this position.

As a senior foreign attorney in my team's International Dispute Resolution Practice Group, I assigned Jung Hoon work or oversaw his work on multiple occasions at Shin & Kim. He thoroughly impressed me with his strong work ethic, reliability, efficient completion of assignments, teachability, responsiveness, and great attitude. His written work consistently demonstrated excellence in terms of issue spotting, legal analysis, organization and logical flow of ideas, diction, persuasiveness, and citation to evidence. Fully native in both Korean and English, he proved to be one of the most essential members of our team. In recognition of this, I gave him the highest marks among all of our group's approximately 10 associates in each semi-annual evaluation in which I evaluated him.

Jung Hoon and I worked closely together on a number of high-value, sophisticated international arbitration cases. For the sake of context, I should note that Shin & Kim is one of the top four practice groups for international arbitration in Korea, and the value of the international arbitration disputes on our books has hovered around USD 7.7 billion in recent years. At any one time, we have about 20 active cases that are being handled by 15 attorneys who are mostly qualified in Korea or the United States. In almost all of our cases, we act as sole or lead counsel.

Due to the export-led nature of the Korean economy (the world's 10th largest) and Korean contractors' success in certain parts of the world economy like large-scale Middle Eastern construction projects, contract disputes between Korean and foreign parties never fail to arise, and practice groups like ours cater to these clients' needs, with the arbitration always being in the English language and the governing law most often being English law, Singapore law, Hong Kong law, Swiss law, or Korean law. Despite the myriad challenges of handling cases governed by laws that we are often not even licensed in (e.g., a New York-licensed lawyer handling a Korean law-governed case), we learn to be resourceful and master the relevant legal principles with help from colleagues (internally or externally) who are licensed in those jurisdictions and then to articulate foreign legal concepts in the framework most familiar to the (often) common law-trained arbitrators.

In Jung Hoon's time at Shin & Kim, he was entrusted with drafting submissions for clients on some of our largest and most complex mandates. For example, I would point to his work on one of our team's most significant cases, an investor-state treaty case between a Korean investor and a foreign state. For this case, Jung Hoon assisted the team enormously by preparing submissions on challenging jurisdictional issues involving public international law and on

SHIN&KIM

technical issues relating to damages. He not only contributed substantially to the drafting of our submissions but also contributed mightily to the document production process and hearing preparation process for this case. He also traveled with the team to Singapore for the week-long hearing and provided excellent assistance.

Perhaps my favorite aspect of working with Jung Hoon is that he saw each assignment as a collaborative opportunity to put our best case forward and that he also relished each assignment as an opportunity to learn and grow. He brightened up my days when he came to my office almost daily to ask for advice about something or to exchange ideas about what would be the best approach to take with regard to a particular legal, factual, or case strategy issue. His spirit of eagerness to collaborate, along with his conscientiousness about representing clients to the highest professional standards, set him apart from his peers, in my view.

Jung Hoon is also well-liked by colleagues thanks to his humble, helpful approach to work. I admire how kindly and professionally he treats all of his colleagues.

If you have any questions about Jung Hoon or my work with him, please feel free to contact me. Thank you.

Sincerely,

Arie C. Eernisse
Senior Foreign Attorney

aeernisse@shinkim.com

www.shinkim.com
Tel 02 316 4114 Fax 02 756 6226
D-Tower (D2), 17 Jongno 3-gil, Jongno-gu, Seoul 03155

SHIN&KIM

15 May 2023

Re: Recommendation Letter for Jung Hoon Yang

To Whom It May Concern,

Mr. Yang worked with me as an associate for over two years. As one of the largest corporate law firms in Korea, we have over 700 professionals. I am one of the partners in our International Dispute Resolution practice, which has over 20 professionals,. Our team works on large, complex international disputes.

During the time Mr. Yang worked on our team. he was exposed to numerous high value, complex international dispute matter. Not only did he work with myself, he also worked closely with every other lawyer in our team, who have varied dispute practice backgrounds in M&A, finance, and technology. Throughout his employment, Mr. Yang had a canny ability to discern the issues pertaining to disputes, conduct research and provide suggestions to solve problems. Not only did he conduct research, he drafted arguments and cross-examination questions for hearings and interlocutory matters.

Besides arbitration, Mr. Yang has had opportunities to draft and review corporate and commercial documents associated with cross-border business transactions. Not only did he complete his work in a timely and professional manner, he worked well with other lawyers on the team. By the end of his time at our group, Mr. Yang had acquired a large degree of competency to assist him in the practice of law. With his integrity and work ethic, I do not hesitate in recommending Mr. Yang for employment in the legal field. If I can be of further assistance, feel free to contact me.

Sincerely yours,

Rockey Yoo

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend an excellent candidate, Jung Hoon (John) Yang, to you as a candidate for an officer professor. Mr. Yang was a student in my first year Civil Procedure class at Harvard Law School in the fall of 2013. The class was very interactive, and I also met with Mr. Yang to discuss the class material, so I came to know his abilities and ambitions well. I have followed Mr. Yang's impressive career – as a JAG officer, arbitration expert, and attorney in Korea – since then. He would bring enormous erudition and experience as a clerk.

Mr. Yang is an extremely impressive student. A quiet and considered presence in class, that exterior hides a very thoughtful and determined analyst. He is a resourceful thinker, an individual who was unfailingly engaged and adept throughout the class. He turned in a very good exam, although the challenges of the new discipline and language slowed him a bit in his answer. Mr. Yang surmounted those barriers in quick order at Harvard. He went on to clerk for a federal magistrate judge, the Honorable Marianne Bowler. In addition, he became a senior officer and editor in one of Harvard's main law journals, the Harvard Journal of Law and Public Policy.

Mr. Yang's achievements are all the more notable because they are hard-fought. His course to Harvard Law School, for example, was unique. The son of immigrants who could not remain in the U.S., Mr. Yang stayed behind alone when he was a senior in high school. He eventually worked his way through college, holding a full-time job and attending night school. His tenacity speaks for itself: he has found his way to Harvard Law School in circumstances that would have beaten many others. At HLS, he was enormously dedicated to working in the public interest at the HLS Tenant Advocacy Project for three years, including as a Board member.

Mr. Yang's experience has only increased his determination. Although resolved to return to the U.S. as a litigator, Mr. Yang returned to Korea where he did his military service as a Judge Advocate Officer for three years. He then specialized in international arbitration for corporate and sovereign clients. Along the way, he worked through the immigration complexities and is now returning to make his career here.

Mr. Yang will become an outstanding lawyer, one who puts the experience you give him to wonderful use. In the meantime, he will repay the chance you give him with enormous work and excellence. I believe he would be a superb teacher and scholar. I strongly recommend him.

Sincerely,

Christine Desan

Leo Gottlieb Professor of Law

Christine Desan - desan@law.harvard.edu - 617-495-4613

COVER PAGE

1. Type: Externship assignment

2. Date Written: February 2015

3. Extent of Editing: The clerk reviewed the draft of the opinion and provided substantive comments, which I incorporated.

4. Explanatory Note: I have selected a portion of the opinion that highlights my legal analysis as the original opinion is about 37 pages in length.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PHILIPPE CHERY,
Plaintiff,

v. CIVIL ACTION NO.
12-12131-GAO

SEARS, ROEBUCK AND
CO., JEFF MERRIFIELD, and
ARMAND MUSTO,
Defendants.

**REPORT AND RECOMMENDATION RE:
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
(DOCKET ENTRY # 24)**

**MEMORANDUM AND ORDER RE:
DEFENDANTS' MOTION TO STRIKE
(DOCKET ENTRY # 34)**

March 3, 2015

BOWLER, U.S.M.J.

Pending before this court is a motion for summary judgment (Docket Entry # 24) filed by defendants Sears, Roebuck and Co. ("Sears"), Jeff Merrifield, ("Merrifield") and Armand Musto ("Musto") (collectively "defendants"). Defendants also seek to strike certain portions of plaintiff's response to their LR. 56.1 statement of undisputed facts and a number of exhibits plaintiff filed to avoid summary judgment. (Docket Entry # 34). Plaintiff Philippe Chery ("plaintiff") opposes both motions. (Docket Entry ## 28 & 41). After conducting a hearing on

November 6, 2014, this court took the motions (Docket Entry ## 24 & 34) under advisement.

PROCEDURAL BACKGROUND

The parties' dispute arises out of plaintiff's employment with Sears where Merrifield and Musto work as managers. The three count complaint sets out the following causes of action: (1) creation and toleration of a racially motivated hostile work environment in violation of Massachusetts General Laws chapter 151B ("chapter 151B") (Count I); (2) retaliation for protected activity under chapter 151B (Count II); and (3) retaliation for protected activity under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 et seq. (Count III). (Docket Entry # 1).

STANDARD OF REVIEW

Summary judgment is designed "'to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.'" Davila v. Corporacion De Puerto Rico Para La Difusion Publica, 498 F.3d 9, 12 (1st Cir. 2007). It is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). It is inappropriate "if the record is sufficiently open-ended to permit a rational factfinder to resolve a material factual

dispute in favor of either side." Pierce v. Cotuit Fire Dist., 741 F.3d 295, 301 (1st Cir. 2014).

"Genuine issues of fact are those that a factfinder could resolve in favor of the nonmovant, while material facts are those whose 'existence or nonexistence has the potential to change the outcome of the suit.'" Green Mountain Realty Corp. v. Leonard, 750 F.3d 30, 38 (1st Cir. 2014). The evidence is viewed "in the light most favorable to the non-moving party" and "all reasonable inferences" are drawn in his favor. Ahmed v. Johnson, 752 F.3d 490, 495 (1st Cir. 2014). Where, as here, the nonmovant bears the burden of proof at trial, he "must point to facts memorialized by materials of evidentiary quality and reasonable inferences therefore to forestall the entry of summary judgment." Geshke v. Crocs, Inc., 740 F.3d 74, 77 (1st Cir. 2014); see Woodward v. Emulex Corp., 714 F.3d 632, 637 (1st Cir. 2013) (as to issues on which nonmovant bears burden of proof, he must "'demonstrate that a trier of fact reasonably could find in his favor'"). "Even in employment discrimination cases 'where elusive concepts such as motive or intent are at issue,' this standard compels summary judgment if the non-moving party 'rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'" Feliciano De La Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 5 (1st Cir. 2000).

"Unsupported allegations and speculation do not demonstrate either entitlement to summary judgment or the existence of a genuine issue of material fact sufficient to defeat summary judgment." Rivera-Colon v. Mills, 635 F.3d 9, 12 (1st Cir. 2011); see Serra v. Quantum Servicing, Corp., 747 F.3d 37, 39-40 (1st Cir. 2014) ("allegations of a merely speculative or conclusory nature are rightly disregarded"). That said, a court "'should exercise particular caution before granting summary judgment for employers on such issues as pretext, motive, and intent.'" Adamson v. Walgreens Co., 750 F.3d 73, 83 (1st Cir. 2014).

Defendants submit a LR. 56.1 statement of undisputed facts. Uncontroverted statements of fact in the LR. 56.1 statement comprise part of the summary judgment record. See Cochran v. Quest Software, Inc., 328 F.3d 1, 12 (1st Cir. 2003) (the plaintiff's failure to contest date in LR. 56.1 statement of material facts caused date to be admitted on summary judgment); Stonkus v. City of Brockton Sch. Dep't, 322 F.3d 97, 102 (1st Cir. 2003) (citing LR. 56.1 and deeming admitted undisputed material facts that the plaintiff failed to controvert). Finally, in reviewing a summary judgment motion, a court may examine "all of the record materials on file," Ahmed, 752 F.3d at 495, "including depositions, documents, electronically stored information, affidavits or declarations . . . or other materials." Fed.R.Civ.P. 56(c)(1).

* * *

DISCUSSION

I. Hostile Work Environment

Plaintiff submits that defendants subjected him to a hostile work environment in violation of chapter 151B. Chapter 151B provides a cause of action for a hostile work environment based on the cumulative effect of a series of abusive acts though each in isolation might not be actionable in itself. See Clifton v. Massachusetts Bay Transp. Authy., 839 N.E.2d 314, 319 n.5 (Mass. 2005). A hostile work environment under Massachusetts law is one that is "pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, [such that it] poses a formidable barrier to the full participation of an individual in the workplace." Cuddyer v. Stop & Shop Supermarket Co., 750 N.E.2d 928, 937 (Mass. 2001).[1]

Whether the working environment is sufficiently hostile to establish a claim under chapter 151B depends on both an objective and subjective evaluation such that a reasonable

[1] Although Cuddyer and other cases cited herein concerned hostile work environment claims based on sexual harassment rather than racial discrimination, courts do not distinguish the two. See, e.g., Windross v. Vill. Auto. Grp., Inc., 887 N.E.2d 303, 306-07 (Mass.App.Ct. 2008) (applying the Cuddyer standard to hostile work environment claim based on racial discrimination); Thompson v. Coca-Cola Co., 522 F.3d 168, 180 (1st Cir. 2008) (same).

person would find it hostile or abusive and that plaintiff in fact did perceive it to be so. See Thompson, 522 F.3d at 179. There is no quantitative requirement or threshold for the number or frequency of incidents necessary to establish the claim. See Gnerre v. Massachusetts Comm'n Against Discrimination, 524 N.E.2d 84, 88-89 (Mass. 1988); accord Noviello v. City of Boston, 398 F.3d 76, 84 (1st Cir. 2005). Accordingly, determining whether a plaintiff meets this standard entails a fact specific assessment of all the attendant circumstances. See Conto v. Concord Hosp., Inc., 265 F.3d 79, 81 (1st Cir. 2001).

Finally, a plaintiff must establish "'some basis for employer liability'" to prevail on a hostile work environment claim. Forrest v. Brinker Int'l Payroll Co., 511 F.3d 225, 228 (1st Cir. 2007).[2] "'A plaintiff must satisfy different standards for establishing employer liability in a hostile work environment case depending on whether the harasser is a supervisor or co-employee of the victim.'" Id. at 230. In order to establish employer liability for harassment by a non-supervisory co-worker, "a plaintiff must demonstrate that the employer 'knew or should have known of the charged . . .

[2] While Forrest was a Title VII case, the Massachusetts Supreme Judicial Court has said that it is "'our practice to apply Federal case law construing the Federal anti-discrimination statutes in interpreting [chapter] 151B.'" Ponte v. Steelcase Inc., 741 F.3d 310, 319 n.9 (1st Cir. 2014). Hence, the court in Ponte applied the employer liability requirement to a hostile work environment claim under chapter 151B.

harassment and failed to implement prompt and appropriate action.'" Id. "If the offender is a supervisor, the employer is liable unless it proves the affirmative defense 'that the employer exercised reasonable care to prevent and correct promptly any [discriminatory] behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'" White v. New Hampshire Dep't of Corr., 221 F.3d 254, 261 (1st Cir. 2000).

Defendants first argue that the hostile work environment claim is time barred. This argument fails. The first incident of racial discrimination occurred on or about November 2, 2010, when Philbrick called plaintiff a "'F' nigger." (Docket Entry # 29-86, p. 45). It is true that plaintiff did not submit his complaint to MCAD until December 20, 2011—well beyond the statutory limitation period of 300 days as provided by section five of chapter 151B. In appropriate circumstances, however, a party alleging employment discrimination may file suit based on events that fall outside the applicable statutes of limitation under the continuing violation doctrine. See Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrimination, 808 N.E.2d 257, 266-67 (Mass. 2004). Under this doctrine, a plaintiff may obtain recovery for discriminatory acts that would otherwise be time barred so long as a related act fell within

the limitations period. Id. The doctrine does not apply to discrete acts that are independently actionable in and of themselves as discriminatory. Ocean Spray, 808 N.E.2d at 268-269.

"The classic example of a continuing violation is a hostile work environment, which 'is composed of a series of separate acts that collectively constitute one unlawful employment practice.'" Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 130 (1st Cir. 2009) (interpreting chapter 151B and ADA). The continuing violation doctrine applies in that setting because "hostile work environment claims by their very nature involve repeated conduct," and "a single act of harassment may not be actionable on its own." Id. (internal brackets omitted). Thus, "'component' acts of a hostile work environment claim that occur outside the limitations period may be considered for purposes of determining liability." Tobin, 553 F.3d at 130.

Taking the summary judgment record in the light most favorable to plaintiff, there is ample proof of racial slurs, epithets and other conduct which a reasonable jury could conclude are objectively and subjectively offensive as to create a hostile work environment. At least one black employee left Sears because of the prevalence of inappropriate racial remarks at Burlington. (Docket Entry # 29-93, pp. 13-14). Philbrick called plaintiff a "'F' nigger." (Docket Entry # 29-86, p. 45).

Smith made various inappropriate comments about the hockey puck (Docket Entry # 26-1, p. 55), plaintiff playing chess (Docket Entry # 26-1, p. 56) and the Haitian victims (Docket Entry # 29-87, p. 21). Smith also regularly misplaced plaintiff's paperwork and disturbed his work. (Docket Entry # 29-87, pp. 2-3). In addition, while Musto was conducting the 88Sears investigation, plaintiff heard some of his co-workers remark, "We're definitely going to win this case against this nigger." (Docket Entry # 26-1, p. 150). Although plaintiff cannot recall the exact time and dates in which these statements were made, at least one falls within the limitations period.[3]

Defendants contend that the alleged incidents of harassment were not part of an ongoing pattern of discrimination. Instead, defendants characterize these incidents as merely sporadic uses of abusive language, race related jokes and occasional teasing which do not rise to the level of an actionable hostile work environment as a matter of law. There is no question, however, that such pervasive use of the term "nigger"—let alone the inappropriate racial remarks—is humiliating and stigmatizing

[3] Because Musto filed a complaint against plaintiff on November 14, 2011, it is safe to presume that the co-workers' statement about winning the case against plaintiff falls within the limitations period. (Docket Entry # 29-49). Plaintiff also believes that Smith made the comment about a natural disaster in Haiti "[p]robably right before [plaintiff] got fired." (Docket Entry # 26-1, p. 152).

both objectively and subjectively. Indeed, "[i]t is beyond question that the use of the word 'nigger' is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is 'perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry.'" McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1116 (9th Cir. 2004).

In addition, a reasonable jury could conclude that such a work environment pervasive with inappropriate remarks and racial epithets could lead to disrespect and insubordination among subordinates. In fact, shortly after the Philbrick incident, employees who had worked with Philbrick for many years began to complain about plaintiff.[4] (Docket Entry # 29-86, pp. 50 & 57) (Docket Entry # 26-9, pp. 51-59). Merrifield and Musto's indifference to—or failure to address—plaintiff's complaint would have further exacerbated the situation. As such, a reasonable jury could conclude that the alleged incidents of harassment constituted a hostile work environment which posed a "formidable barrier to the full participation of [plaintiff] in the workplace." Cuddyer, 750 N.E.2d at 937. Discriminatory incidents that would otherwise be time barred, such as the Philbrick incident, would therefore fall within the limitations

[4] Within only a month after the Philbrick incident, four employees complained about plaintiff. (Docket Entry # 26-9, pp. 51-59)

period under the continuing violation doctrine. See Ocean Spray, 808 N.E.2d at 266-67; Tobin, 553 F.3d at 130.

Turning to employer liability, it is evident that there is sufficient evidence in the summary judgment record for a reasonable jury to conclude that defendants knew or should have known of the hostile work environment. Plaintiff reported the incidents with Philbrick and Smith to Merrifield and demanded action. (Docket Entry # 29-87, p. 3) (Docket Entry # 29-89, p. 25). Musto was also aware of plaintiff's complaint to 88Sears regarding racial discrimination at Burlington. (Docket Entry # 29-97, p. 17). Both Merrifield and Musto nevertheless did not comply with Sears' guideline which required managers to immediately conduct an impartial investigation. (Docket Entry # 29-95, pp. 2-3). Merrifield dissuaded plaintiff from escalating the Philbrick incident and barely attempted to investigate his allegation against Smith. Upon learning of plaintiff's complaint, Musto even filed a complaint against plaintiff instead of conducting an impartial investigation. Although 88Sears did conduct an investigation into plaintiff's alleged discrimination, HR Consultants directed and allowed Musto and Reid—who already had concerns about plaintiff's performance—to lead the investigation. (Docket Entry, # 29-95, p. 6). This was in spite of Sears' policy that the investigation be impartial. (Docket Entry # 29-50). Accordingly, a reasonable

jury could easily conclude that defendants knew or should have known of the discrimination and that they "failed to implement prompt and appropriate action." Forrest, 511 F.3d at 230. Count I therefore survives summary judgment.

* * *

CONCLUSION

In accordance with the foregoing discussion, this court **RECOMMENDS**[5] that defendants' motion for summary judgment (Docket Entry # 24) be **DENIED.** To the extent set forth above, the motion to strike (Docket Entry # 34) is **DENIED.**

/s/ Marianne B. Bowler
MARIANNE B. BOWLER
United States Magistrate Judge

[5] Any objections to this Report and Recommendation must be filed with the Clerk of Court within 14 days of receipt of the Report and Recommendation to which objection is made and the basis for such objection. See Rule 72(b), Fed.R.Civ. P. Any party may respond to another party's objections within 14 days after service of the objections. Failure to file objections within the specified time waives the right to appeal the order.

Applicant Details

First Name	**Jennifer**
Last Name	**Yu**
Citizenship Status	**U. S. Citizen**
Email Address	**jjy28@cornell.edu**
Address	**Address** **Street** **515 Ninth Avenue, Apt. 6N** **City** **New York** **State/Territory** **New York** **Zip** **10018** **Country** **United States**
Contact Phone Number	**5164917281**

Applicant Education

BA/BS From	**Columbia University**
Date of BA/BS	**May 2017**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 15, 2021**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Journal of Law and Public Policy**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Cornell Moot Court**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Freed, Lara
lgf28@cornell.edu
607-255-5889

Benjamin, James
jbenjamin@akingump.com

Diaz, Estela
esdiaz@starbucks.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

515 Ninth Avenue, Apt. 6N
New York, NY 10018
(516) 491-7281
June 21, 2023

The Honorable Judge Kiyo Matsumoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am writing to apply for a 2025 clerkship with your chambers. I am currently a second-year litigation associate at Akin Gump Strauss Hauer & Feld ("Akin") in New York City.

While still at the beginning of my career, I have had the opportunity to work both chambers and private defense work, and realize the importance of both for a trial litigator. In my third year of law school, I externed for Judge Sinatra, and my externship confirmed my interest in clerking. At Akin, I have worked on federal litigation matters such as a criminal trial alleging wire fraud affecting a financial institution, in which I assisted in drafting a wide range of pre-trial, trial, and post-trial materials and participated in the trial itself. I thoroughly enjoy such work and learned a great deal about trial work. I anticipate continuing to have similar opportunities at Akin, but I would like to clerk to deepen my exposure to federal litigation practice and to become an even more effective litigator by strengthening my ability to synthesize and distill complex legal concepts.

At Akin, I have consistently received positive feedback on my strong work ethic, attention to detail, and efficiency. Notably, in my evaluation last year, I was commended for my ownership and commitment to our clients, as well as the quality of my work product, which is above what is typical for associates at my level. I believe I will be of great service to you.

A resume, transcript, and one writing sample are enclosed. Three letters of recommendation from the following people will be sent separately:

James J. Benjamin, Jr.	**Estela Díaz**	**Professor Lara G. Freed**
One Bryant Park	2401 Utah Ave South	256A Hughes Hall
New York, NY 10036	Seattle, WA 98134	Ithaca, NY 14853-4901
(212) 872-1000	(718) 874-8320	(607) 255-5889

Thank you for your consideration. I look forward to hearing from you.

Sincerely,
Jennifer Yu

Jennifer Jinsuk Yu

515 Ninth Avenue, Apt 6N, New York, NY 10018 · (516) 491-7281 · jjy28@cornell.edu

EXPERIENCE

Akin Gump Strauss Hauer & Feld LLP — **New York, NY**
Litigation Associate — *Summers 2019 & 2020, 2021 – Present*

Trial and Court Experience: As part of a 7-person team, represented a former precious metals trader in a federal criminal trial alleging wire fraud affecting a financial institution. Drafted and researched support for motions *in limine*, direct and cross examinations, an outline for the closing argument, a response to a jury note, post-trial briefs, and sentencing materials.

Investigations: Drafted an analysis of potential policy violations by and claims against a former employee of a global asset management firm based on a review of 1,000+ communications and an interview of the employee. Produced communications and prepared a company executive for an internal interview in connection with an EDNY investigation into alleged insider trading. Drafted analyses of potential sexual misconduct policy violations by a student.

Direct Counseling: Prepared a witness for an SEC deposition. Prepared a defense witness. Interviewed a VAWA client and prepared notes in narrative form for the client's affidavit.

Writing and Research: Drafted and researched support for a petition and supporting materials to confirm an arbitration award, which led to a successful outcome in the Commercial Division of New York Supreme Court. Drafted several petitions to expunge records for clients at the Mississippi Center for Justice.

Pro Bono: Member of Akin Gump's New York Pro Bono Committee. Liaison on behalf of Akin Gump to Sanctuary for Families and the Asian American Legal Defense and Education Fund.

The Honorable John L. Sinatra, Jr., District Court Judge for the Western District of New York — **Buffalo, NY**
Judicial Intern — *January – April 2021*

Assisted in drafting opinions and observed court proceedings, including hearings for guilty pleas and sentencing.

Sanctuary for Families — **New York, NY**
Intern — *June – August 2019*

Drafted advocacy materials on Senate Assembly Bill A8230, which proposed to decriminalize prostitution and other prostitution-related offenses in New York.

Christian Union — **New York, NY**
Ministry Intern for Freshmen Women — *August 2017 – May 2018*

EDUCATION

Cornell Law School — *J.D., May 2021*

Honors: Dean's List (Spring 2021 semester); GPA: 3.59
2020 Cantwell Prize for Exemplary Student Research, Second Place
CALI Excellence for the Future Awards (Guilty Acts, Guilty Minds; Child Advocacy Clinic I)

Activities: *Executive Editor*, Cornell Journal of Law and Public Policy
Honors Fellow, Lawyering Program; *Teaching Assistant*, Academic Orientation Program
Academic Chair, Women of Color Collective

Moot Court: *Executive Vice Chancellor*, Moot Court Board
2019 NYC Bar Competition, Semifinalist & Third Place Brief
2019 Cuccia Cup Competition, Finalist
2019 Langfan Family First-Year Competition, Round of 16

Mock Trial: *Vice President of Internal Competitions*, Mock Trial Board
2019 Mock Trial Internal Competition, Semifinalist

Columbia University, Columbia College — *B.A., May 2017*

Honors: Dean's List (every semester); GPA: 3.79
Departmental Honors in Sociology

PUBLICATIONS

Note, *Without the Forbidden Fruit: Returning to the Wild Beast Test*, 30 CORNELL J.L. & PUB. POL'Y (2021).

Kids & Teens in Quarantine: Considerations for Navigating Co-Parenting During COVID-19, CORNELL J.L. & PUB. POL'Y, THE ISSUE SPOTTER (Apr. 24, 2020), http://jlpp.org/blogzine/kids-teens-in-quarantine-considerations-for-navigating-co-parenting-during-covid-19/.

Cornell University
Law School

Lawyers in the Best Sense

June 2021

Cornell Law School Grading Policy for JD Students
Faculty grading policy calls upon each faculty member to grade a course, including problem courses and seminars, so that the mean grade for JD students in the course approximates 3.35 (the acceptable range between 3.2 and 3.5). This policy is subject only to very limited exceptions. †

Class Rank
As a matter of faculty policy we do not release the academic rankings of our students. Interested individuals, including employers, have access to the top 10% approximate cumulative grade point cut off for the most recent semester of completion. In addition, at the completion of the students second semester and every semester thereafter the top 5% approximate cumulative grade point average is also available. In general students are not ranked however the top ten students in each class are ranked and are notified of their rank.

Class of 2021 [six semesters]:
5% - 3.8838 10% - 3.8239
Class of 2022 [four semesters]:
5% - 3.8465 10% - 3.8018
Class of 2023 [two semester]:
5% - 3.9574 10% - 3.7848

Dean's List
Each semester all students whose *semester* grade point average places them in the top 30% of their class are awarded Dean's List status. Students are notified of this honor by a letter from the Dean and a notation on their official and unofficial transcripts.

Myron Taylor Scholar
This honor recognizes students whose cumulative MPR places them in the top 30 percent of their class at the completion of their second year of law school. Students are notified of this honor by a letter from the Dean of Students and a notation on their transcripts.

Academic Honors at Graduation
The faculty awards academic honors at graduation as follows: The faculty awards the J.D. degree summa cum laude by special vote in cases of exceptional performance. The school awards the J.D. degree magna cum laude to students who rank in the top 10% of the graduating class. Students who rank in the top 30% of the class receive the J.D. degree cum laude unless they are receiving another honors degree. For the graduating Class of 2021, the gpa cut off for magna cum laude was 3.8318 and for cum laude was 3.6542. Recipients are notified by a letter from the Dean and a notation on their official and unofficial transcripts.

The Order of the Coif is granted to those who rank in the top 10% of the graduating class. To be eligible for consideration for the Order of the Coif, a graduate must take 63 graded credits at Cornell Law. (The Order of the Coif is a National Organization that sets its own rules.)

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PAGE: 2 of 2

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Program: Law					
Plan: Law					
CIVIL PROCEDURE	LAW 5001			3.00	A-
CONSTITUTIONAL LAW	LAW 5021			4.00	B+
CONTRACTS	LAW 5041			4.00	A-
LAWYERING	LAW 5081			2.00	A-
PROPERTY	LAW 5121			3.00	A-
SPRING 2019					
Program: Law					
Plan: Law					
CIVIL PROCEDURE	LAW 5001			3.00	B+
CRIMINAL LAW	LAW 5061			3.00	A
LAWYERING	LAW 5081			2.00	A-
TORTS	LAW 5151			3.00	B+
EVIDENCE	LAW 6401			3.00	A-
FALL 2019					
Program: Law					
Plan: Law					
ADMINISTRATIVE LAW	LAW 6011			3.00	B+
BUSINESS ORGANIZATIONS	LAW 6131			3.00	B
FEDERAL WHITE COLLAR CRIME	LAW 6241			3.00	A-
FAMILY LAW	LAW 6421			3.00	B+
SUP TEACH/WRITING HONORS PROG	LAW 6881			2.00	SX
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Plan: Law					
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FIRST AMENDMENT LAW	LAW 6201			3.00	B+
CRIMINAL PROC.: ADJUDICATIONS	LAW 6263			3.00	A-
PROFESSIONAL RESPONSIBILITY	LAW 6641			3.00	A-
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Program: Law					
Plan: Law					
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GL	-	In the descriptive title area - course taken at graduate level by Summer Session and Extramural students only.
H	-	"HONORS" for LL. M. Candidates.
HH	-	"HIGH HONORS" for LL. M. Candidates.
INC	-	Course not completed for reasons acceptable to Instructor.
NA	-	Not attending.
NG	-	Non-graded course - Grades are not awarded for these courses.
NGR	-	No grade reported - Instructor has not submitted a grade for this course.
R	-	Represents multi-term course not graded until the end of the sequence.
S/U	-	"S" means C- or above; "U" means D+, D, D- or failure.
SX/UX	-	Indicates that a course is graded exclusively on "S" or "U" basis.
V	-	Visitor - Audit; course taken on a non-credit basis.
W	-	Indicates withdrawal from course after deadline.
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These are described on a separate sheet which is provided with appropriate transcripts.

Current Grading System

Grades are on a letter scale: A+ through D-, pass; F, failure. The grades of S (satisfactory) or U (unsatisfactory) may be used when no greater precision in grading is required. Grades of S or U are not assigned numerical value and thus are not averaged with other grades in computing grade point averages.

Letter grade values are combined with course credit hours to produce an average based on a 4.3 scale.

For the purpose of computing semester, year or cumulative averages, each letter grade is assigned a quality point value as follows:

A+	= 4.3	B+	= 3.3	C+	= 2.3	D+	= 1.3
A	= 4.0	B	= 3.0	C	= 2.0	D	= 1.0
A-	= 3.7	B-	= 2.7	C-	= 1.7	D-	= 0.7

F = 0

Beginning with Fall term 1983, Law School averages are computed using the following point values:

A+	= 4.33	B+	= 3.33	C+	= 2.33	D+	= 1.33
A	= 4.00	B	= 3.00	C	= 2.00	D	= 1.00
A-	= 3.67	B-	= 2.67	C-	= 1.67	D-	= 0.67

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Writing Sample

This writing sample is a draft of a motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. This draft was reviewed by senior counsel, and I incorporated some of their feedback. This draft was originally 25 pages long, but portions have been omitted. The identities of the client and other individuals and entities have been anonymized.

Table of Contents

PRELIMINARY STATEMENT

Pursuant to Fed. R. Crim. P. 29, Mr. Defendant respectfully moves the Court to vacate his conviction for wire fraud affecting a financial institution and enter a judgment of acquittal. For the reasons set forth below, the trial evidence was insufficient for a rational juror to conclude beyond a reasonable doubt that the government proved Mr. Defendant (i) made a material, false statement when he placed orders; and (ii) acted with the intent to defraud.[1]

First, the government failed to introduce evidence sufficient to show that Mr. Defendant made a false statement to the Victim's algorithmic traders, or any other party, when he placed orders on the CME. In fact, the government's witnesses conceded that Mr. Defendant never directly communicated with trading counterparties. As testimony at trial established, a trader placing an order on the CME was required to input only (i) the desired product or commodity, (ii) whether the order was to buy or sell, (iii) the order price, and (iv) the quantity of contracts in the order. Mr. Defendant's orders explicitly contained and conveyed to other traders all of this information and nothing more. To sidestep this problem, the government effectively relied on the legally tenuous "right-to-control" theory, arguing Mr. Defendant's orders implicitly sent "false signals to the market" about supply and demand. Certain courts have upheld the right-to-control theory in situations that are factually distinct from this case, thereby expanding the wire fraud statute to include the deprivation of information regarding a victim's economic decision. Although the government did not directly cite this theory, the premise of its argument was that Mr. Defendant somehow deprived algorithmic traders of their ability to make discretionary economic decisions

[1] If the Court denies this motion—or conditionally grants this motion pursuant to Federal Rule of Criminal Procedure 29(d)—Mr. Defendant requests a new trial pursuant to Federal Rule of Criminal Procedure 33, for the reasons set forth herein and in Mr. Defendant's motion for a new trial, filed contemporaneously.

In this memorandum of law "GX" refers to government exhibits that were received at trial and "Trial Tr." refers to proceedings at the trial in this case.

and caused them to enter into transactions that they would not have otherwise entered into. But any evidence that purportedly supports this speculative argument is antithetical to the conventional understanding of fraud as requiring a false statement that goes to the nature of the bargain itself and deprives the victim of property.

Second, the government failed to introduce evidence sufficient to support a finding that Mr. Defendant acted with the intent to defraud when he traded. Instead, the government built its case on Mr. Defendant's intent around broadly worded, general compliance materials and CME Rule 432—which makes no mention of spoofing and is not a criminal law in any event—and asked the jury to pile inference upon inference to conclude that Mr. Defendant *personally* understood that these compliance materials and the CME rules prohibited spoofing. Tellingly, however, the government did not call a single witness who had ever spoken to Mr. Defendant about spoofing or his understanding of the permissibility of the practice when he traded in 2009 and 2010. In fact, the evidence and testimony presented at trial showed that Mr. Defendant was consistently open and transparent about his trading, including openly discussing his trading strategy with other traders and compliance officers, with CFTC lawyers in his deposition in September 2010, and with the FBI in his November 2018 interview. Mr. Defendant's transparency is inconsistent with a criminal intent to defraud.

Accordingly, as set forth in detail below, no rational juror could conclude that Mr. Defendant made material false statements or acted with the intent to defraud, and the Court should grant Mr. Defendant's motion for a judgment of acquittal.

LEGAL STANDARD

Under Fed. R. Crim. P. 29, a court must set aside the verdict and enter a judgment of acquittal for "any offense for which the evidence is insufficient to sustain a conviction." *See* Fed.

R. Crim. P. 29(a), (c). A judgment of acquittal is warranted when, viewing the evidence in the light most favorable to the government, no rational trier of fact could conclude that the government proved the elements of the crime beyond a reasonable doubt. *See United States v. Garcia*, 919 F.3d 489, 496-97 (7th Cir. 2019); *United States v. Mohamed*, 759 F.3d 798, 803 (7th Cir. 2014); *see also United States v. Jones*, 713 F.3d 336, 339 (7th Cir. 2013) ("[T]he height of the hurdle depends directly on the strength of the government's evidence.").

Where, as here, the government's case relies on circumstantial evidence and inferences, a court must ensure that "each link in the chain of inferences [is] sufficiently strong to avoid a lapse into speculation," in order to protect against a conviction based on mere speculation. *See Garcia*, 919 F.3d at 503 (citing *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir. 2001)). "Circumstantial evidence that leads only to a 'strong suspicion that someone is involved in a criminal activity is no substitute for proof of guilt beyond a reasonable doubt.'" *See id.* at 501 (citing *Piaskowski*, 256 F.3d at 692). In determining the sufficiency of the evidence, a court will assess the government's evidence against the amount and types of evidence that have been previously found sufficient or insufficient. *See id.* at 498.

ARGUMENT

I. The Government Failed to Present Evidence Sufficient to Show That Mr. Defendant Made Material False Statements to Victim's Algorithmic Traders.

The government failed to introduce evidence that Mr. Defendant made material misrepresentations to any of his trading counterparties. To the contrary, evidence and testimony at trial unequivocally established that Mr. Defendant's orders conveyed only four pieces of information—product, buy or sell, price, and quantity—that his orders were real and immediately executable at the bid or offer price at which Mr. Defendant placed them, and that Mr. Defendant satisfied his end of the bargain on every order.

A. The Evidence Established that Mr. Defendant Did Not Make False Statements.

Several of the government's witnesses, including Mr. Witness 1, testified about the information visible to a trader in the order book. Each of these witnesses confirmed that an order placed in the order book conveys only four pieces of information to other traders: (i) the desired product or commodity, (ii) whether the order was to buy or sell, (iii) the order price, and (iv) the quantity of contracts in the order. *See* Trial Tr. at 273:8-15 (testimony of Mr. Witness 1) (". . . [T]he things that you need to put on your order is buy or sell, the price, and the quantity, the number of contracts . . . ."); 298:14-23 (same); 300:7-16 (confirming that traders cannot find out more information about orders); 346:20-347:1 (confirming that algorithmic traders also have to specify the same four pieces of information). Mr. Defendant's orders all contained these four pieces of information. *See* Trial Tr. at 453:8-11 (testimony of Mr. Witness 2) (confirming that all of Mr. Defendant's orders in the government's charts in GX 75 and 76 existed in the CME data); 1112:24-1113:15 (testimony of Professor X) (confirming that Mr. Defendant's orders were real and were received and accepted by the CME). There was no place for Mr. Defendant to communicate his intent to other traders. *See* Trial Tr. at 331:13-24 (testimony of Mr. Witness 1) (Q. "Okay. And on this TT ladder, there is no information about the strategy that the trader is using to enter their orders, right?" A. "Correct." Q. "Okay. There's no information on this TT ladder about the trader's purpose behind – or objectives for their orders, rights?" A. "Correct.").

Once Mr. Defendant's order was placed on the CME, it was immediately executable at the stated bid or offer price; in other words, it was a real order. *See* Trial Tr. at 319:1-19 (testimony of Mr. Witness 1) (confirming that once an order is on Globex it is real, immediately executable, and tradeable); 598:24-599:1, 605:9-10 (testimony of FBI Agent) (confirming that Mr. Defendant's orders were fully executable in GX 83, sequences that Mr. Defendant was shown

during his FBI interview); 1040:5-11, 1043:2-8, 1043:16-18 (testimony of Victim) (reviewing Mr. Defendant's orders in GX 75 and confirming that the orders were real); 1112:24-1113:4 (testimony of Professor X) (confirming that Mr. Defendant's orders were real). Apart from the four pieces of information Mr. Defendant conveyed through his orders, he did not communicate with his trading counterparties. Indeed, Victim conceded that Mr. Defendant never directly communicated with Victim or its algorithms. *See* Trial Tr. at 1045:10-1046:1 (testimony of Victim). Given the anonymous nature of the CME, Mr. Defendant could not have done so, even if he had wanted to. *See* Trial Tr. at 269:25-270:2 (testimony of Witness 1) (Q. "And when trading electronically, do traders know who they're exchanging with or who else is in the market?" A. "They do not. All trading on Globex is anonymous."); 298:6-299:17 (confirming that traders could not identify who their counterparties were); 300:7-301:4 (confirming that traders could not contact potential counterparties); 327:24-328:12 (confirming that traders could not negotiate orders); 1036:21-1037:6 (testimony of Victim) (confirming trading on the CME is anonymous and not like buying a house); 1041:24-1042:11 (confirming that Mr. Defendant did not have conversations with Algorithm 1 because Algorithm 1 would not have known that Mr. Defendant was a counterparty); 1044:20-1045:9 (confirming that Mr. Defendant did not have conversations with Algorithm 3 because Algorithm 3 would not have known that Mr. Defendant was a counterparty).

B. The Government's "Implied Misrepresentation" Theory Does Not Constitute Wire Fraud.

Unable to prove that Mr. Defendant made explicit misrepresentations to other market participants, the government's theory was that Mr. Defendant—by entering "real orders"—sent "false signals to the market about supply and demand," *see* Trial Tr. 1330:1-1332:10 (government's closing argument), but such a theory is not a sufficient basis for a wire fraud conviction. The government's witnesses described these purported signals to the market as

creating "a false sense of supply or demand," Trial Tr. at 251:53 (testimony of Witness 1); "a false interest of prices and quantities," Trial Tr. at 924:5 (testimony of Witness 3); "false signals of buying and selling," Trial Tr. 1004:17 (testimony of Victim); and "false trading interest," Trial Tr. 1057:9-10 (testimony of Professor X). Despite the fact that Mr. Defendant's orders were real and executable at their stated price by others in the market, the government argued that the Mr. Defendant was sending false signals about supply and demand when he entered orders. *See* Trial Tr. at 1331:20-1332:10 (government's closing argument). In other words, the government argued that Mr. Defendant made "implied misrepresentations" to his counterparties that constituted false statements for purposes of proving wire fraud.

The government's implied misrepresentation theory is not legally cognizable because fraud requires a misrepresentation that goes to the *nature* of the bargain itself. *See United States v. Kelerchian*, 937 F.3d 895, 912-13 (7th Cir. 2019) ("Schemes that do no more than cause their victims to enter into transactions they would otherwise avoid . . . do not violate the mail and wire fraud statutes.") (quoting *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015)); *United States v. Weimert*, 81 F.3d 351, 354 (7th Cir. 2016) (finding no fraud where "[a]ll the actual terms of the deal . . . were fully disclosed."); *United States v. Filer*, No. 19 CR 565, 2021 WL 4318087, at *5 (N.D. Ill. Dec. 23, 2021) (Leinenweber, J.), *rev'd on other grounds*, 56 F.4th 421 (7th Cir. 2022) (distinguishing schemes that cause victims to enter into transactions they would otherwise avoid as not constituting wire fraud). As the Seventh Circuit in *Weimert* counseled: "Federal wire fraud is an expansive tool, but as best we can tell, no previous case at the appellate level has treated as criminal a person's lack of candor about the negotiating positions of parties to a business deal. In commercial negotiations, it is not unusual for parties to conceal from others their true goals, values, priorities, or reserve prices in a proposed transaction." 81 F.3d at 354; *see also United States v.*

Keplinger, 776 F.2d 678, 698 (7th Cir. 1985) ("[W]e do not imply that all or even most instances of non-disclosure of information that someone might find relevant come within the purview of the mail fraud statute.").[2]

That the government's witnesses universally testified that Mr. Defendant's orders sent false signals to the market does not change the fact that Mr. Defendant's counterparties got exactly what they bargained for when they accepted his order—the exact product, bought or sold, at a given price, for a given quantity. Indeed, the government's witnesses agreed that Mr. Defendant's trading counterparties got exactly what they bargained for: an exchange of a certain number of precious metals futures contracts at the offered price. *See* Trial Tr. at 301:2-4 (testimony of Witness 1) (confirming that orders are "take it or leave it"); 1041:21-23 (testimony of Victim) (confirming that Algorithm 1 sold the exact number of contracts Mr. Defendant ordered to buy); 1044:17-19 (confirming that Algorithm 3 sold the exact number of contracts Mr. Defendant ordered to buy); 1116:1-1117:2 (testimony of Professor X) (Q. "This is a commercial transaction, correct?" A. "Yes." Q. "Both sides have received the benefit of their bargain, correct?" A. "Yes.").

Moreover, the government's implied misrepresentation theory is a variant of the right-to-control theory, which has been rejected by Sixth and Ninth Circuits and limited by the Seventh Circuit to situations in which there is some duty of disclosure. *See, e.g.*, *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014); *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). Originating in the Second Circuit, under the right-to-control theory, a false or misleading statement

[2] The Seventh Circuit warned that "it is possible to put together broad language from courts' opinions on several different points so as to stretch the reach of the . . . wire fraud statute[] far beyond where [it] should go." *Weimert*, 819 F.3d at 355. Although the Seventh Circuit in *United States v. Chanu* determined that an implied misrepresentation theory was a viable theory of wire fraud, 40 F.4th 528, 541 (7th Cir. 2022), we respectfully submit that the Seventh Circuit's reasoning in that case was supported in part by inapposite precedent like *United States v. Stephens*, 421 F.3d 503 (7th Cir. 2005), which involved *affirmative* misrepresentations (i.e., submitting false reports of cash advances).

can support a wire fraud conviction if it deprives the victim of information necessary to make discretionary economic decisions. *See generally United States v. Wallach*, 935 F.2d 445, 461-64 (2d Cir. 1991). The theory is premised on the principle that such a statement harms the victim's right to control their assets. Consistent with this logic, the government suggested that the evidence established that Mr. Defendant deprived Victim's algorithmic traders of economically valuable information that was necessary in order to make discretionary decisions on which trades they were going to make. Referencing Victim's testimony, the government argued that by merely placing spoof orders, without a so-called "genuine intent to trade," Mr. Defendant triggered the algorithmic traders' decisions to trade—the mere existence of these orders supposedly created pressure that influenced the algorithms' decisions. *See* Trial Tr. 1332:16-1333:9 (government's closing argument).

However, as the Seventh Circuit explained in *United States v. Walters*, the right-to-control theory cannot properly support a fraud conviction where there is no fiduciary relationship, or something akin to a fiduciary relationship, between the defendant and the victim. *See* 997 F.2d 1219 (7th Cir. 1993). There, the court overturned Walters' mail fraud conviction, and rejected the government's right-to-control argument as "an intangible rights theory once removed—weaker even than the position rejected in *Toulabi v. United States*, 875 F.2d 122 (7th Cir. 1989), and *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988), because Walters was not the universities' fiduciary." *Walters*, 997 F.2d at 1226 n.3. The court reasoned that "[a] customer willing to trade at a known price is like a university willing to give a scholarship to a known athlete. A customer who loses the honesty of the traders, but no money, has not been defrauded of property." *Id.* at 1226.

Similarly, in *United States v. Catalfo*, the Seventh Circuit only upheld the right-to-control

theory where the defendant shifted an enormous risk of loss to a clearing firm that had agreed to back his trades through written agreement. 64 F.3d 1070, 1077 (7th Cir. 1995). The court found that the relationship between Catalfo and the victim, while not rising to the level of a fiduciary relationship, supported a cognizable right-to-control theory. *See id.* at 1077-78. Here, Mr. Defendant had no such relationship with the alleged victims. Moreover, unlike Catalfo, Mr. Defendant never communicated directly with the alleged victims and did not misstate or withhold any information that he was required to provide when he placed bids and offers. Mr. Defendant did not impose any "risk" on anyone—any "risk" that his counterparties assumed by trading was part of the ordinary course of trading on the exchanges. *See* Trial Tr. at 1046:8-9 (testimony of Victim) (Q. "Mr. Defendant did not force Algorithm 1 or Algorithm 3 to trade with him?" A. "Correct.").

Courts in the Seventh Circuit have narrowly applied the right-to-control theory in limited situations that are inapplicable here.[3] There is no cognizable property right to economically valuable information, and withholding such information does not, standing alone, automatically deprive a victim of property.

Even assuming for the sake of argument that Mr. Defendant sent implicit "false signals" about supply or demand, these implied statements were not material. Victim was, at all times, in complete control over the decision to trade or not trade with Mr. Defendant, as well as which assumptions Victim's algorithmic traders should or should not make. Victim could have simply

[3] *Compare Walters*, 997 F.2d at 1226 n.3 *with Catalfo*, 64 F.3d at 1077; *see also Ryan v. United States*, 759 F. Supp. 2d 975, 1006-07 (N.D. Ill. 2010), *vacated on other grounds*, 566 U.S. 972 (2012) (upholding the right to control theory in the context of government spending); *United States v. Villazan*, No. 05 CR 792, 2007 WL 541950, at *5 (N.D. Ill. Feb. 15, 2007) (same); *United States v. Sorich*, 427 F. Supp. 2d 820, 827 (N.D. Ill. 2006) (same).

Further, the U.S. Supreme Court is poised to reject the right-to-control theory entirely in *Ciminelli v. United States*, No. 21-1170. Because the right-to-control theory arose in the corporate fiduciary context, its reasoning has not been coherently applied outside of that context to tangible items subject to an arms-length relationship, like a trade.

programmed their algorithms to account for such trading behavior. Indeed, Victim agreed that its algorithms could be programmed "to identify and discount spoofing" just as "a human trader may decide to assign less weight" to such a pattern. *See* Trial Tr. at 1034:1-15 (testimony of Victim). But instead of doing so, Victim simply assumed that every order had "genuine trading interest" and programmed its algorithms accordingly. *See* Trial Tr. at 1037:7-17 (testimony of Victim). The fact that Victim made this assumption has no bearing on whether Mr. Defendant made material misrepresentations, as Mr. Defendant was under no obligation to represent any "genuine trading interest" when he traded. *See* Trial Tr. at 1037:14-1038:18 (testimony of Victim) (confirming that the algorithms' assumptions were not based on any then-existing CME rules in 2009 and 2010).

Further, the so-called "shocks" to the market that Mr. Defendant's spoof orders purportedly caused were actually very small market price movements. *See* Trial Tr. at 1149:17-1150:5 (testimony of Professor X) (confirming that the "shock" in a sequence in GX 75 was the minimum tick size in the silver futures market, half of a cent); 1152:8-11 (same) (confirming that the market price similarly moved after Mr. Defendant's trading). In fact, when pressed on cross examination, Professor X conceded that *any* new information that the market responds to would constitute a "shock." *See* Trial Tr. at 1154:5-8 (testimony of Professor X) (Q. "Do you consider [all displayed market price movements] to be shocks to the market, yes or no?" A. "Yes. News is a shock. One can think about it as a shock. It's new information."). Testimony from Victim and Professor X fail to prove that Mr. Defendant's alleged implied statements were material.

II. The Government Failed to Prove Beyond a Reasonable Doubt That Mr. Defendant Acted with the Requisite Intent to Defraud.

[Omitted.]

a. Vague, Broadly Worded Rules and Compliance Materials Are Insufficient to Prove Beyond a Reasonable Doubt That Mr. Defendant Acted with the Requisite Intent to Defraud.

[Omitted.]

b. FBI Agent's Uncorroborated Testimony Is Insufficient to Prove Beyond a Reasonable Doubt That Mr. Defendant Intended to Defraud When He Traded.

[Omitted.]

c. The Government Did Not Prove Beyond a Reasonable Doubt That Mr. Defendant Lied to the CFTC.

[Omitted.]

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Defendant's motion, vacate Mr. Defendant's conviction for wire fraud affecting a financial institution, and enter a judgment of acquittal.

Applicant Details

First Name	**Arnold**
Last Name	**Zahn**
Citizenship Status	**U. S. Citizen**
Email Address	**arnold.zahn.2023@lawmail.usc.edu**
Address	**Address** Street **1323 Waverly Rd** City **San Marino** State/Territory **California** Zip **91108**
Contact Phone Number	**(626) 993-7668**

Applicant Education

BA/BS From	**Columbia University**
Date of BA/BS	**May 2020**
JD/LLB From	**University of Southern California Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90513&yr=2009**
Date of JD/LLB	**May 14, 2023**
Class Rank	**I am not ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Southern California Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Brown, Rebecca
rbrown@law.usc.edu
213-740-1892
Stolzenberg, Nomi
nstolzenberg@law.usc.edu
Palmer, Shane
palmersh@sullcrom.com
(212) 558-4085
Pithia, Henna
HPithia@law.usc.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Arnold Zahn
1323 Waverly Rd.
San Marino, CA 91108

April 26, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
for the Eastern District of New York
225 Cadman Plaza East, Room 905 S
Brooklyn, New York 11201-1818

Dear Judge Matsumoto:

I am writing to apply for a clerkship in your chambers for the 2025–2026 term, or any term thereafter. I am a third-year student at the University of Southern California Gould School of Law, concurrently serving as a judicial extern for Judge Kim McLane Wardlaw of the United States Court of Appeals for the Ninth Circuit. After one year as an Associate at Sullivan & Cromwell, I will be serving as a law clerk for Judge Julia S. Gibbons of the United States Court of Appeals for the Sixth Circuit during the 2024–2025 term.

I currently serve on the *Southern California Law Review* as its Executive Articles Editor. In this role, I oversee the selection of all scholarly articles to be published in our ninety-sixth volume. I was previously a student attorney in our International Human Rights Clinic. In this capacity, I drafted and submitted a Communique to the International Criminal Court's Office of the Prosecutor urging the Prosecutor to launch a preliminary investigation into crimes against humanity, which have been committed since 2016 in the Republic of Cameroon against Cameroon's Anglophone population.

I am seeking a clerkship in your chambers because serving as a clerk will allow me to contribute to an important dimension of legal life involving the careful evaluation of past precedent. As someone who is committed to reaching the correct legal answer to any given legal question, serving as a clerk will allow me to participate in the process of upholding the rule of law in a fair and impartial manner. The opportunity to think deeply and critically about legal issues in a fast-paced environment and to directly effect a legal outcome is one I find to be very appealing.

A resume, writing sample, transcript, and letters of recommendation from Professor Nomi M. Stolzenberg, Professor Henna Pithia, and Professor Rebecca L. Brown are enclosed. I am available for an interview at your convenience and can be reached at (626) 993-7668. Should you require additional information, please do not hesitate to let me know.

Sincerely,

Arnold Zahn

Arnold Zahn

1323 Waverly Rd, San Marino, CA 91108| (626) 993-7668 | arnold.zahn.2023@lawmail.usc.edu

EDUCATION

University of Southern California, Gould School of Law — **Los Angeles, CA**
Juris Doctor — *May 2023*
Honors: *Southern California Law Review*, Executive Articles Editor, Vol. 96; USC Law Merit Scholarship Award
Activities: International Human Rights Clinic; International Law and Relations Organization, President; Research Assistant to Professor Lee Epstein; Asian Pacific American Law Students Association, Academic Affairs Chair; First Generation Professionals

Columbia College, Columbia University — **New York, NY**
Bachelor of Arts in Political Science, magna cum laude — *May 2020*
Honors: *Phi Beta Kappa*
Activities: Columbia Center for Contemporary Critical Thought, Eric H. Holder Jr. Initiative for Civil and Political Rights, NYC's Harmony Program, Alexander Hamilton Society, Taiwanese American Student Association

University of Oxford, Lady Margaret Hall — **Oxford, England**
Year-long Study Abroad, Philosophy, Politics, and Economics, First-class honours — *June 2019*
Activities: Oxford Union, Oxford University Orchestra

EXPERIENCE

United States Court of Appeals for the Sixth Circuit — **Memphis, TN**
Judicial Law Clerk to the Hon. Julia S. Gibbons — *Aug 2024 – Aug 2025*

United States Court of Appeals for the Ninth Circuit — **Pasadena, CA**
Judicial Extern to the Hon. Kim McLane Wardlaw — *Jan – Apr 2023*
Performed extensive research on issues of law and fact presented by an appeal and reviewed transcripts of proceedings below for errors by the trial judge or counsel. Drafted detailed bench memoranda on a variety of constitutional issues. Assisted in preparing the judge for oral argument. Drafted an opinion pursuant to the judge's directions.

Sullivan & Cromwell LLP — **New York, NY**
Summer Associate (offer extended) — *May – July 2022*
Performed extensive research and drafted memoranda on a variety of complex substantive and procedural matters in antitrust, commercial litigation, intellectual property, and an action brought by the Commodities Futures Trading Commission. Drafted a memorandum to a pro bono client with an analysis of international law and its application to Russia's invasion of Ukraine.

USC International Human Rights Clinic — **Los Angeles, CA**
Student Attorney — *Aug 2021 – May 2022*
Drafted and submitted a Communique to the International Criminal Court's Office of the Prosecutor, pursuant to Article 15 of the Rome Statute, urging the Prosecutor to launch a preliminary investigation into crimes against humanity, which have been committed in the Republic of Cameroon against Cameroon's Anglophone population. Drafted and finalized targeted sanctions requests, under various Magnitsky-style legal mechanisms, to the United Kingdom's Foreign, Commonwealth, & Development Office and to the Council of the European Union.

United States Attorney's Office for the Central District of California — **Los Angeles, CA**
Legal Extern, Civil Division — *June 2021 – Aug 2021*
Assisted Assistant United States Attorneys with legal research, writing pleadings, trial preparation, completing appellate briefs, and responding to habeas corpus petitions. Investigated *qui tam* complaints under the False Claims Act.

United States Department of Justice, Civil Division — **Washington, DC**
Intern, Consumer Protection Branch — *July 2019 – Aug 2019*
Meticulously reviewed thousands of pages of transcripts and identified important information to help prepare for a deposition in healthcare and opioid-related fraud cases. Summarized transcripts of grand-jury testimony on technical topics like the target's corporate structure to the details of its pharmaceutical marketing.

AWARDS & HONORS

Oxford/Cambridge Scholars Program
Eric H. Holder Jr. Initiative for Civil and Political Rights Fellow
Edwin Robbins Public Service Award
Columbia College Dean's List (Every semester enrolled)

LEADERSHIP & VOLUNTEER ACTIVITIES

Clarinet Instructor for underserved youth in NYC's Harmony Program
Guest Liaison Officer for The Oxford Union
President of Columbia's Taiwanese American Student Association

LANGUAGES & INTERESTS

Languages: Spanish (Proficient), Chinese (Proficient)
Interests: Music composition, Classical music, Jazz, International security, Barbecue

UNIVERSITY OF SOUTHERN CALIFORNIA
OFFICIAL ACADEMIC TRANSCRIPT

OFFICE OF THE REGISTRAR
LOS ANGELES, CA 90089-0912
(213) 740-7445

STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Zahn, Arnold	4577-7358-02	06-16-2023	1 of 4

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ISSUE TO:

CONTROL #: 000002389474

RAISED SEAL NOT REQUIRED

This transcript is not valid without the university seal and the signature of the Registrar. A raised seal is not required.

Frank Chang
Registrar

Current Program of Study

02/26/2020 Juris Doctor
Law

USC Cumulative Totals

Law Units Attempted: 95.0 Earned: 92.0 Available: 92.0 GPA Units: 67.0 Grade Points: 253.70 GPA: 3.78

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Fall Semester 2020 (08-17-2020 to 12-16-2020)

LAW-530	CR	1.0	Fundamental Business Principles
LAW-515	3.3	3.0	Legal Research, Writing, and Advocacy I
LAW-509	3.3	4.0	Torts I
LAW-502	4.3	4.0	Procedure I
LAW-503	3.4	4.0	Contracts

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
16.0	16.0	15.0	53.90	3.59

Spring Semester 2021 (01-11-2021 to 05-14-2021)

LAW-516	3.6	2.0	Legal Research, Writing, and Advocacy II
LAW-508	3.8	3.0	Constitutional Law: Structure
LAW-507	3.6	4.0	Property
LAW-505	3.5	3.0	Legal Profession
LAW-504	CR	3.0	Criminal Law

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	12.0	43.50	3.62

Summer Semester 2021 (05-19-2021 to 08-10-2021)

LAW-781	CR	4.0	Externship I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
4.0	4.0	0	0	0.00

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Zahn, Arnold	4577-7358-02	06-16-2023	3 of 4

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Fall Semester 2021 (08-23-2021 to 12-15-2021)

LAW-875	4.2	3.0	Constitutional Theory Seminar
LAW-860	3.8	4.0	International Criminal Law
LAW-532	3.7	3.0	Constitutional Law: Rights
LAW-767A	CR	1.0	Law Review Staff
LAW-849	CR	5.0	International Human Rights Clinic I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
16.0	16.0	10.0	38.90	3.89

Spring Semester 2022 (01-10-2022 to 05-13-2022)

LAW-768	CR	1.0	Law Review Writing
LAW-871	4.1	3.0	First Amendment
LAW-850	3.8	5.0	International Human Rights Clinic II
LAW-767B	CR	1.0	Law Review Staff
LAW-753	4.1	3.0	Antitrust Law I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
13.0	13.0	11.0	43.60	3.96

Fall Semester 2022 (08-22-2022 to 12-14-2022)

LAW-769A	CR	1.0	Law Review Editing
LAW-873	4.1	3.0	Judicial Opinion Writing
LAW-821	CR	3.0	Trial Advocacy
LAW-712	3.9	3.0	Negotiation Theory and Application
LAW-608	3.5	4.0	Evidence
LAW-602	CR	3.0	Criminal Procedure

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
17.0	17.0	10.0	38.00	3.80

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Spring Semester 2023 (01-09-2023 to 05-12-2023)

LAW-769B	CR	2.0	Law Review Editing
LAW-777	3.8	4.0	Administrative Law and Regulatory Policy
LAW-874	4.0	3.0	Advanced Supreme Court Advocacy
LAW-685	4.3	2.0	The Modern U.S. Supreme Court

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
11.0	11.0	9.0	35.80	3.97

---------- End of Transcript ----------

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ACADEMIC TRANSCRIPT INFORMATION

NOTE: *The information that follows represents current University policies. Questions regarding historical University policies and/or transcript notations should be addressed to the Office of the Registrar. This document contains a number of security features. Further information or authentication can be obtained by calling the Office of the Registrar (213) 740-9230.*

COURSE CREDIT/UNIT VALUE
A semester unit is a credit of one hour per week for one semester (15 weeks in length).

COURSE NUMBERING AND CLASSIFICATION
The first digit of the course indicates the year level of the course. 000-preparatory courses; 100-first undergraduate year; 200-second undergraduate year; 300-third and fourth undergraduate years without graduate credit; 400-third and fourth undergraduate years with graduate credit for graduate students; 500-first graduate year; 600-second graduate year; and 700-third graduate year.

GRADING SYSTEM
The following grades are used: A, excellent; B, good; C, fair in undergraduate courses and minimum passing in courses for graduate credit. D, minimum passing in undergraduate courses; and F, failed. Additional grades include CR, credit; NC, no credit; P, pass; and NP, no pass. The following marks are also used: W, withdrawn; IP, in progress; UW, unofficial withdrawal; MG, missing grade; IN, incomplete; and IX, lapsed incomplete.

GRADE POINT AVERAGE (GPA) CATEGORIES/CLASS LEVEL
A system of grade points is used to determine a student's grade point average. Grade points are assigned to grades as follows for each unit in the credit value of a course. A, 4.0 points; A-, 3.7 points; B+, 3.3 points; B, 3.0 points; B-, 2.7 points; C+, 2.3 points; C, 2.0 points; C-, 1.7 points; D+, 1.3 points; D, 1.0 points; D-. 0.7 points; F, 0 points; UW, 0 points; and IX, 0 points. Marks of CR, NC, P, NP, W, IP, MG and IN do not affect a student's grade point average. There are four categories of class level and GPA: Undergraduate, Graduate, Law, and Other. UNDERGRADUATE is comprised of Freshman (less than 32 units earned), Sophomore (32 to 63.9 units earned), Junior (64 to 95.9 units earned) and Senior (at least 96 units earned). GRADUATE is comprised of any coursework attempted while pursuing a master's and/or doctoral degree. LAW is comprised of any coursework attempted while pursuing a Juris Doctor or Master of Laws degree. Other is comprised of any coursework attempted while not admitted to a degree program or coursework not available for degree credit.

CLASS RANK
The University of Southern California does not calculate or support a class rank for its undergraduate students. While most graduate programs do not rank students, requests for graduate student class rankings should be directed to the dean of the particular school in which the graduate degree was earned.

STUDENT GOOD STANDING
A student is considered to be in good standing if they are eligible to register for classes. Disciplinary good standing is determined by the Office of Community Expectations.

TRANSFER CREDIT
Coursework accepted from other institutions is summarized into undergraduate and graduate areas. The summary information includes the number of units and GPA. The transfer institution(s) and dates of attendance do not appear on the USC transcript.

GOULD SCHOOL OF LAW GRADING SYSTEMS
Beginning in Fall 2022, courses are graded numerically from 4.0 to 1.9, with letter-grade equivalents ranging from A to F. The grade equivalents are 4.0 to 3.8 (A); 3.7 to 3.5 (A-); 3.4 to 3.3 (B+); 3.2 to 3.0 (B); 2.9 to 2.7 (B-); 2.6 to 2.5 (C+); 2.4 (C); 2.3 to 2.1 (C-); 2.0 (D); and 1.9 (F).

From Fall 2012 through Spring 2022, courses were graded numerically from 4.4 to 1.9, with letter grade equivalents ranging from A+ to F. The grade equivalents are 4.4 to 4.1 (A+); 4.0 to 3.8 (A); 3.7 to 3.5 (A-); 3.4 to 3.3 (B+); 3.2 to 3.0 (B); 2.9 to 2.7 (B-); 2.6 to 2.5 (C+); 2.4 (C); 2.3 to 2.1 (C-); 2.0 (D); and 1.9 (F).

From Fall 2001 through Spring 2012, courses were graded numerically from 4.4 to 1.9, with letter grade equivalents ranging from A+ to F. The grade equivalents are 4.4 to 4.1 (A+); 4.0 to 3.8 (A); 3.7 to 3.5 (A-); 3.4 to 3.3 (B+); 3.2 to 3.0 (B); 2.9 to 2.7 (B-); 2.6 to 2.5 (C+); 2.4 (C); 2.3 to 2.0 (D); and 1.9 (F).

Prior to Fall 2001, the grading system consisted in numbers in a range from 90 to 65. A grade of 90 was equivalent to highest honors and was very rare; 89 to 85 high honors; 84 to 80, honors; 79 to 70, satisfactory; 69 to 66, unsatisfactory; and 65, failing.

OSTROW SCHOOL OF DENTISTRY GRADING SYSTEM
Students admitted to the Doctor of Dental Surgery program in Fall 1990 or later and students admitted to the International Student Program in Summer 1991 or later, are bound by the University's grading system (excluding plus/minus grades), which is detailed *above* under the heading "GRADING SYSTEM." Academic records for dentistry students who attended prior to the dates listed above are housed independent of the University's central record system. Contact the Ostrow School of Dentistry directly for this earlier academic record information.

KECK SCHOOL OF MEDICINE TRANSCRIPTS
Transcripts for medical students are housed independent of the University's central records system. Contact the School of Medicine directly for this academic record information.

LANGUAGE OF INSTRUCTION
English is the language of instruction at USC. All courses are taught in English with the exception of a few advanced language courses.

ACCREDITATION
The University of Southern California is fully accredited by the Western Association of Schools and Colleges. For additional professional accreditation information, please refer to the latest issue of Accredited Institutions of Postsecondary Education published by the American Council on Postsecondary Accreditation (COPA).

Rev.02/2023

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am delighted to recommend to you one of the strongest clerkship candidates I have ever recommended, Arnold Zahn. I would place him in the top 5% of students I have taught in my 34 years of teaching. He would hold his own with any of the fellow clerks I encountered when I had the privilege, long ago, of clerking for the D.C. Circuit and the U.S. Supreme Court.

Arnold was a student in my Constitutional Rights course and in a small seminar on constitutional theory. In both settings his contributions to the class discussions and his written work set him apart as a truly impressive intellect. A quiet and unassuming participant, his comments and insights reflected a deeper level of thinking and analysis than I am accustomed to seeing in the classroom. He consistently saw connections between doctrine and deeper implications, and asked the one question that revealed what was at stake in every discussion. A recurring theme to his contributions was the failure of constitutional doctrine to address the issue of how to ensure basic flourishing to those living in deprivation. But his was never a political or ideological trope; it was a deep inquiry into the meaning of self-government, liberty and justice in a system that does not afford affirmative entitlements of basic human needs.

Talking to Arnold outside of class, I learned that he had studied at Oxford and had done his undergraduate work at Columbia, both experiences clearly making deep impressions on Arnold's absorption of his legal education. His conversation outside of class revealed him to be extremely well-read and thoughtful, having all of the attributes that will make him a fine lawyer and an outstanding law clerk. First, he tackles the written material with vigor and critical thinking—he approaches the task of learning the law as an exercise in asking the hardest questions of the material and seeking a depth of understanding that goes well beyond what an average law student typically achieves. Second, he approaches legal issues with an openness of mind that eschews easy answers—an ability that is increasingly important in an environment of polarized legal discourse. In my seminar in particular, Arnold was able to dig deeply into the writings of authors with whom he might not have agreed, without any trace of pre-judgment, but rather made an effort to make the best of each argument and hold it up to the light for evaluation. In my view that kind of objective analysis is a value that the best lawyers provide, and Arnold slips naturally into it with his quiet and surgical dissection of each argument, with special talent for thinking about its implications in the world.

I believe that Arnold will approach the job of clerking as a combination of the ultimate learning experience and the opportunity to contribute to the work of the chambers. He is a committed learner, but without a self-referential perspective; rather, Arnold holds deep passion for the hope of being a change maker in the world through his practice of law. Thus, he seeks excellence both within himself and in the external applications of that work. The standards that he holds out for himself are of the highest order and drive him to a dizzying work ethic. The paper he wrote for my seminar was extremely impressive and earned him the highest grade in the class.

For a person of the prodigious talent that Arnold has, he is refreshingly humble, kind and interested in the views of others. He will be a prized member of any team with whom he works, and I believe will earn a place as one of your most cherished clerks.

Very truly yours,

Rebecca L. Brown
The Rader Family Trustee Chair in Law

Rebecca Brown - rbrown@law.usc.edu - 213-740-1892

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to offer the strongest possible recommendation for Arnold Zahn, who is applying for a clerkship. Arnold was my student last year; the subject was the law of the First Amendment. I have been teaching for well over thirty years and I can say, without hesitation, that Arnold is one of the strongest students I have ever had. He absorbed highly abstruse doctrines almost instantly, undaunted by the complexities and contradictions that riddle this area of law. In so doing, he demonstrated his keen analytical mind, sharp eye for distinctions, and a natural aptitude for constructing and deconstructing legal arguments. His questions and comments in class revealed a desire to plumb the depths of each doctrine on its own and to see how the pieces fit together (or don't). Arnold is able to identify gaps and points of ambiguity in the doctrine and to see how these create openings and opportunities for developing different lines of argument. His final exam was simply superb (A+), on a completely different level than the rest of the (very fine) class.

In addition to his intellectual ability, Arnold also possesses character traits that one would want and value in judicial chambers. Without being loud or dominating, he was consistently the most active contributor to class discussions, both answering and posing questions in ways that helped to advance the collective learning process as well his own. I could always count on him not just to be there, but to participate and to model good participation for others. Other students looked to him and clearly respected his command of the material. Yet he was always respectful of others and engaged their points of view. He is hard-working, dedicated, earnest, and a pleasure to interact with.

All of the above is based on my personal observations and interactions with Arnold. The same remarkable qualities that I've observed first-hand are on display in his academic record and his work experience. His undergraduate transcript is straightforwardly stellar. His grades in law school are in some ways even more impressive and interesting. While some of his grades are below A, he has garnered no less than four A+ grades, including one in his first semester of law school (for Civil Procedure). This tells me that his stellar performance in my class is far from a fluke. Attending law school in the time of the pandemic has been, to say the least, challenging, and students have been deprived of the kinds of social interaction and support that ordinarily enhance the learning experience while facing personal challenges of their own. None of this has stopped Arnold from giving his all to his studies and achieving the highest degree of academic success. In addition to his outstanding performance in Civil Procedure, Constitutional Theory, Antitrust Law, and First Amendment, Arnold participated in (and got an A for his contributions to) our International Human Rights Clinic, run by my remarkable colleague Hannah Garry. Here he had the opportunity to put his burgeoning legal skills into practice in a context of great political and social import. His advocacy on behalf of Cameroon is an experience that I know was extremely meaningful to him and reflective of his commitment to social justice work.

There is no doubt in my mind that Arnold has the skills, ability and personal characteristics to be an outstanding clerk. I really do not think you could do better! I hope you will take his candidacy seriously. If you would like to discuss his candidacy with me further, do not hesitate to call. (I can be reached at 310-308-4471.)

Sincerely yours,

Nomi M. Stolzenberg

Nomi Stolzenberg - nstolzenberg@law.usc.edu

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to you as Visiting Clinical Assistant Professor of Law at the International Human Rights Clinic ("the Clinic") at the University of Southern California Gould School of Law. I had the privilege of supervising Mr. Arnold Zahn during his time in the Clinic from September 2021 to May 2022. Mr. Zahn was selected as a student attorney in the Clinic after a competitive application and interview process. He was one of eight students selected for the 2021 to 2022 academic year. As detailed below, I wholeheartedly recommend Mr. Zahn for a judicial clerkship.

The Clinic was established in 2011 to address some of the most pressing human rights issues of our time. Each year, the Clinic focuses on four main competencies including international criminal justice and accountability for atrocities (war crimes, crimes against humanity, genocide); refugee rights; fair trial rights; and, anti-human trafficking and racial justice.

During most of Mr. Zahn's clinical experience, he focused on accountability for mass atrocities by way of global human rights sanctions frameworks. He also spent time in San Jose, California helping Afghan refugees with their applications for lawful permanent residence. As described in detail below, Mr. Zahn is a strong writer, accountable for his work product, and a critical thinker.

During Mr. Zahn's first semester in the Clinic, he spent most of his time (about 15-20 hours each week) learning about the international human rights sanctions frameworks at play and how he could leverage them to persuade government officials in both the United States (U.S.) and the United Kingdom (U.K.) to impose sanctions on perpetrators of human rights abuses in a particular African country. To that end, Mr. Zahn met with government officials from the U.S. Department of Treasury to explain the importance of the U.S. sanctions framework and why designations were necessary for government officials and separatists in a particular African country. Although we had worked on a script for this particular call, government officials took the call in a different and unique direction. Mr. Zahn, who was only just learning about the U.S. sanctions framework, was quick on his feet and able to answer their questions comprehensively, as if he had been working on sanctions requests for several years. This ability to think quickly on his feet and professionally engage with U.S. government officials demonstrated his intellect and the ownership he felt over his work product, two things that are extremely important in any clinical setting.

During Mr. Zahn's second semester with the Clinic, he transitioned into a more proactive and independent role. I was gratified to see this growth in him (and several other student attorneys). As a second semester student attorney, Mr. Zahn worked on a sanctions request before the European Union. Mr. Zahn worked closely with a fellow student attorney to draft the request (over 80 pages in length) and ensure that it contained the most accurate information. The final work product demonstrated Mr. Zahn's strong research and writing skills. Additionally, during his second semester in the Clinic, Mr. Zahn drafted a short memorandum that was used as the foundation for Written Parliamentary Questions tabled by a range of U.K. Parliamentarians. These important conversations ensured that the human rights abuses occurring in a particular African country remained on the political agenda. In fact, in part because of Mr. Zahn's important contribution to this memorandum, the Clinic has been asked to produce a similar document during the Fall 2022 semester. Finally, Mr. Zahn continuously demonstrated an ability to critically think about important issues. In fact, during a seminar that I taught on U.S. Immigration Law, Mr. Zahn was the only student to think critically about the continued use of immigration quotas and their origin. During many seminars, Mr. Zahn asked questions and provided commentary that yielded some of the best conversations all year. Based on Mr. Zahn's performance in the Clinic, I assigned him an A (3.8) grade, a tie for the third highest grade in the class.

In addition to his academic performance, Mr. Zahn built relationships with all of the other clinic students and was easy to interact with. Mr. Zahn's ability to ask important questions and think critically about issues often motivated others in the Clinic to speak up when they most likely would have otherwise stayed quiet. I think his presence on any team would only serve to enrich everyone else's experience.

Mr. Zahn was a wonderful student to supervise and I wholeheartedly recommend him for this judicial clerkship. If you have any further questions, I am available via email at hpithia@law.usc.edu or via telephone at (951) 454-3007.

Sincerely,

Henna Pithia
Visiting Clinical Assistant Professor of Law
International Human Rights Clinic
USC Gould School of Law

Opinion of the Court

SUPREME COURT OF THE UNITED STATES

No. 21-1168

ROBERT MALLORY *v.* NORFOLK SOUTHERN RAILWAY CO.

ON WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

[December 2, 2022]

JUSTICE ZAHN delivered the opinion of the Court.

This case poses serious questions regarding the power of States in our federal system to assert personal jurisdiction over nonresident corporations. States have undoubted sovereign interests in hearing a variety of suits against nonresident corporations conducting in-state business operations. But the State cannot compel a corporation to submit to any and all claims filed against it divorced from any recognized interest in the dispute. There are indeed constitutional limits on the "consent" States may extract from nonresident corporations. These limits demand a sovereign interest in the dispute sufficient for consent jurisdiction to be validly exercised under a registration statute, consistent with the values of fairness and interstate federalism that the Due Process Clause seeks to protect.

The Due Process Clause protects an individual's right to be subject only to a state court's lawful exercise of judicial power. We find that the Pennsylvania statute's sweeping assertion of judicial power cannot be reconciled with either the

Due Process requirement of fundamental fairness in judicial proceedings or the Due Process limits that our system of interstate federalism places on any one state's exercise of judicial power. Accordingly, we affirm.

I

Petitioner Robert Mallory ("Mallory"), a citizen of Virginia, brought an action against Respondent Norfolk Southern Railway ("Norfolk Southern"), a railroad company that maintained its principal place of business in Virginia and was incorporated in Virginia. Mallory worked for the railroad in Virginia and Ohio from 1988 to 2005 and claims that he developed cancer because of exposure to carcinogens while working in Virginia and Ohio. Even though Mallory was from Virginia, Norfolk Southern was from Virginia, and the alleged torts occurred in Ohio and Virginia, Mallory sued in a Pennsylvania state court.

To establish personal jurisdiction in Pennsylvania, Mallory turned to Pennsylvania's registration and long-arm statutes. The registration statute provides that an out-of-state corporation "may not do business" in the State "until it registers" with the State. 15 Pa. Cons. Stat. Ann. § 411(a) (2019). And the separate long-arm statute provides that a state court may exercise "general personal jurisdiction" based on "qualification as a foreign corporation." 42 id. § 5301(a)(2)(i). Norfolk Southern has registered to do business in Pennsylvania. Mallory argued that, by registering, the railroad has consented to general personal jurisdiction in Pennsylvania.

The state trial court dismissed the suit for lack of personal jurisdiction. The court rejected Mallory's argument that Norfolk Southern consented to general jurisdiction when it registered to do business in Pennsylvania. In the trial court's view, Norfolk Southern's consent to jurisdiction was illusory, as Norfolk Southern was faced with the "Hobson's choice" between doing business in Pennsylvania while consenting to general personal jurisdiction, and not doing any business in Pennsylvania.

The state supreme court affirmed. It explained that, under this Court's precedents, a state court may exercise general jurisdiction over a corporation only if the corporation is "at home" there. The state supreme court then rejected Mallory's contention that Norfolk Southern had consented to general jurisdiction in Pennsylvania by registering to do business there. The court explained that registration is not "voluntary consent," but rather "compelled submission to general jurisdiction by legislative command." The court added that treating registration as valid consent would, in effect, nullify this Court's cases limiting the scope of general jurisdiction.

This Court granted certiorari to resolve the question of whether the Due Process Clause of the Fourteenth Amendment allows a state to assert general personal jurisdiction over an out-of-state corporation simply because it registers to do business there, as required by state law.

II

A

The Due Process Clause "centrally concerns the fundamental fairness of governmental activity." *N.C. Dep't of Rev.* v. *The Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2219 (2019). It ensures the government's compliance with "traditional notions of fair play and substantial justice" when exercising its adjudicative authority. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316–317 (1945). A state court undermines these values of fairness and justice, and thereby violates the Due Process Clause of the Fourteenth Amendment, when it subjects a defendant to judgment without personal jurisdiction. *See Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1024 (2021).

The canonical *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), requiring that a state court's exercise of personal jurisdiction be consistent with "traditional notions of fair play and substantial justice" and "reasonable, in the context of our federal system of government" has placed important Due Process limitations on personal jurisdiction. And because these Due Process limitations on personal jurisdiction reflect considerations of interstate federalism, principles of interstate federalism and due process fairness are necessarily intertwined. In assessing a defendant's rights under the Due Process Clause, a court may determine whether it would be acting in excess of its authority to assert jurisdiction over a non-resident defendant, especially as measured relative to the authority of other States. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980).

International Shoe recognized personal jurisdiction as principally an inquiry into "the relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977). In *International Shoe*, the Court held that the courts of a State may exercise personal jurisdiction over a nonresident defendant if the case "arise[s] out of or [is] connected with" activities within the territorial borders of that State. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 311–314, 320 (1945). Therefore, under *International Shoe*, fairness within a federal system for a state court involves the ability "to enforce the obligations which [the nonresident defendant] ha[d] incurred" in that State. *Id.* at 321. *International Shoe* thereby grounds the fair and lawful exercise of judicial power in a State's sovereign interest in the dispute.

The sovereign interest rationale of *International Shoe* suggests an important limitation of personal jurisdiction. Because the court's power to exercise jurisdiction derives from the defendant's voluntary relation to the state, the power should be tethered to cases arising out of that relation and to cases that are causally connected to in-state conduct. Through its "minimum contacts" test, *International Shoe* laid the groundwork for the standards of fundamental fairness in the exercise of personal jurisdiction. In particular, *International Shoe* transformed the personal jurisdiction analysis from the territorial approach applied in *Pennoyer* to a contacts-focused, "arise out of or relate to" approach. *International Shoe,* 326 U.S. at 319. The sovereign interest rationale of *International Shoe* explains the subsequent

narrowing of circumstances in which a court may lawfully exercise all-purpose general jurisdiction.

The Court's subsequent decisions in *Daimler AG* v. *Bauman*, 571 U.S. 117, 133 (2014) and *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915 (2011), reflecting *International Shoe*'s insistence that judicial power be tethered to cases arising out of the activities of the forum State, establish our current general jurisdiction framework. Both decisions limited the scope of general jurisdiction to where corporations are "at home." Accordingly, a court may assert general jurisdiction over out-of-state corporations only "when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum state." *Daimler*, 571 U.S. at 127 (quoting *Goodyear*, 564 U.S. at 919). A corporation's place of incorporation and principal place of business have been recognized as the primary examples of where corporations are deemed "at home." *See id.* at 137.

The scope of general jurisdiction has been limited in this way for important reasons. Because general jurisdiction reaches "any and all claims," it requires contacts "so substantial and of such a nature as to justify" the state's assertion of all-purpose authority over the defendant. *Goodyear*, 564 U.S. at 919, 924. Because there are already "unique" and "ascertainable" venues where a corporation is at home, *Daimler* and *Goodyear* both rejected the notion that a corporation is also at

home wherever it engages in a substantial, continuous, and systematic course of business." *Daimler AG*, 571 U.S. at 137; *Goodyear*, 564 U.S. at 927.

Daimler and *Goodyear* have, for good reason, narrowed the circumstances in which a State may exercise general jurisdiction. Because general jurisdiction allows a State to hear any claim against a defendant, even claims where the State has no sovereign interest, its exercise can threaten the sovereignty of other States. *Daimler AG*, 571 U.S. at 140–142. Accordingly, the Court has found little practical justification for giving general jurisdiction broad scope when specific jurisdiction already protects the interests of the forum State and the plaintiff. *See id.* at 132-133 nn. 9–10. Therefore, this Court has held that defendants are subject to general jurisdiction only in their home States. *Id.* at 137. Respect for the values of interstate federalism underlies in part the proper scope of general jurisdiction.

The Due Process limitation on when general jurisdiction may be asserted incorporates considerations of interstate federalism. Emphasizing the importance of interstate federalism, this Court has also held that principles of interstate federalism embodied in the Due Process Clause, alone, can preclude a state court's exercise of personal jurisdiction. *See Bristol-Myers Squibb Co.* v. *Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780–81 (2017); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293–294 (1980); *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958). This reflects the Court's recognition of the dangers of all-purpose general jurisdiction in that it can enable some States—particularly large ones—to impose their legislative

will on others and thereby legislate on a national level. Thus, federalism-based concerns under the Due Process Clause limit the scope of a state court's exercise of personal jurisdiction.

By guaranteeing state and local governments broad decision-making authority, federalism principles secure decisions that rest on knowledge of local circumstances, serve to develop a sense of shared purposes and commitments among local citizens, and ultimately facilitate "novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932). But all-purpose general jurisdiction wrests away this authority from other States and their ability to legislate for their own residents. *See Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). In doing so, all-purpose general jurisdiction severely undermines these federalist aims and the federalist principles upon which our government is built.

B

The exercise of general jurisdiction over Norfolk Southern in this case does not satisfy due process, as required by *Goodyear* and *Daimler*. Norfolk Southern is not at home in Pennsylvania. Norfolk Southern is not incorporated in Pennsylvania nor does it have its principal place of business in Pennsylvania. And there is no indication that this dispute involves contacts "so substantial and of such a nature as to justify" the state's assertion of all-purpose authority over Norfolk Southern. While Norfolk Southern has maintained railroad tracks in Pennsylvania, as

International Shoe itself teaches, a corporation's "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 326 U.S., at 318. This Court has emphatically rejected this result as "unacceptably grasping," as it would subvert the "unique[ness]" *Daimler* emphasized as well as the federalism-based concerns expressed in *International Shoe*. *Daimler*, 571 U.S. at 137–38; *International* Shoe, 326 U.S. at 321.

The exercise of general jurisdiction over Norfolk Southern would harm principles of interstate federalism. Mallory's claims indisputably have "no connection whatsoever" to Pennsylvania. Pet. App. 45a. Yet Pennsylvania's long-arm statute would allow Mallory to sideline Virginia, bring his case in Pennsylvania's courts, and (by virtue of the Full Faith and Credit Clause) compel Virginia to abide by Pennsylvania's decision. *See* U.S. Const. Art. IV, § 1. Mallory's position allows Pennsylvania to arrogate to itself the role of determining "what the law is" for Virginia. In effect, Mallory's position would enable Pennsylvania to use registration as an avenue for expanding the power of its own courts to hear countless suits, involving countless parties, in which Pennsylvania has no legitimate sovereign interest. While a forum selection clause in an isolated contract does not distort the interstate balance of sovereignty, Pennsylvania's scheme based on an across-the-board, mandatory registration does. This assertion of power conflicts with the mutual respect for state sovereignty essential to interstate federalism.

To add insult to injury, Mallory's position would also subvert democratic self-government in Virginia, as Virginia citizens will have their policy preferences supplanted by the policy preferences of Pennsylvania citizens. Virginia was home to both parties and the location of the alleged harm. Pet. App. at 2a. Virginia thus has substantial sovereign interests in protecting both resident parties and regulating or remedying conduct that allegedly causes harm there. Yet Mallory's view would give Virginia's judges, jurors, and voters no role in deciding this dispute. The exercise of all-purpose general jurisdiction, if applied in this case and all future cases involving a similar registration statute, would have the cumulative effect of disempowering state citizens in their ability to shape their own communities and share in the creation of public policy.

The democratic nature of our Constitution, guaranteeing a "republican form of government,"[1] proscribes such an effective denial of a citizen's right to participate in the political life of their community. By allowing Pennsylvania to seize jurisdiction over this case and others like it, Pennsylvania's scheme "infringe[s] upon the sovereignty of sister states." *Id.* at 47a. Therefore, principles of interstate federalism are sufficient to preclude Pennsylvania's exercise of general jurisdiction.

In sum, Mallory's position would render irrelevant the all-important "relationship among the defendant, the forum, and the litigation," which is *International Shoe*'s touchstone. *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977). To

[1] U.S. Const. art. I; amends. XIV, XV, XIX; *id.* art. IV.

assert general jurisdiction over Mallory's claim, based on registration alone, would flout "*Daimler*'s directive that a court cannot subject a foreign corporation to general all-purpose jurisdiction based exclusively on the fact that it conducts business in the forum state." Pet. App. 65a. *International Shoe, Goodyear*, and *Daimler* each rest on the legal principle that a defendant's general business activities in the forum do not entitle state courts to hear claims unrelated to the forum. To assert general jurisdiction here is to gut entirely this core legal principle embedded within our established general jurisdiction framework and to undermine the principles of interstate federalism that our personal jurisdiction precedents have sought to preserve. In the absence of consent, Pennsylvania court's sweeping assertion of judicial power plainly violates the Due Process Clause.

III

Now, Mallory has correctly indicated that *International Shoe*, *Goodyear*, and *Daimler* all address whether a *non-consenting* defendant's contacts with a forum are sufficient to support personal jurisdiction. *International Shoe*, 326 U.S. at 317. *See Daimler*, 571 U.S. at 129; *Goodyear*, 564 U.S. at 927–28. Indeed, a state court, which otherwise lacked the power to exercise personal jurisdiction, may alternatively exercise personal jurisdiction with the defendant's consent. *See Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Consent jurisdiction thus elides the traditional contacts-based distinction between general and specific jurisdiction, *i.e.*, whether the suit arises out of or

relates to the defendant's in-state activities. *Ford Motor Co.* v. *Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017,1024–25 (2021).

But here, Pennsylvania's statute deems a nonresident corporation's mandatory registration "a sufficient basis" for "general personal jurisdiction." 42 Pa. Cons. Stat. § 5301(a)(2)(i). This assertion of jurisdiction by mere registration is not based on any kind of consent that this Court has recognized in the past. Consent—let alone effective consent—does not exist here. Therefore, Mallory cannot use consent to make an end-run around our current general jurisdiction framework.

A

First, Norfolk Southern could not have possibly provided voluntary consent because of the immense impracticability of leaving Pennsylvania. The option of leaving Pennsylvania was simply not available. Therefore, the "consent" Mallory speaks of is illusory. It is not feasible for railroads to dig up their tracks and move them to a neighboring state. This Court has recognized that the property of a railroad within a state "is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which . . . can be taken elsewhere and put to use at other places and under other circumstances." *Southern Ry.* v. *Greene*, 216 U.S. 400, 414 (1910). And even if they could practically halt operations in a state, railroads do not have the unilateral right to abandon a market. They cannot legally do so without the Surface Transportation Board's

permission, which would almost certainly be denied in this case.[2] Requiring foreign corporations either to do business in Pennsylvania while consenting to general jurisdiction, or not to do business in Pennsylvania at all is an illusory choice. Norfolk Southern had no other choice but to register under Pennsylvania's statute. This is not consent.

And second, Pennsylvania's registration statute does not once speak in terms of consent. The registration form itself says nothing about jurisdiction, courts, or even service of process. JA1–2. Importantly, the registration statute nowhere calls for an appointment of an agent for service of process, unlike the registration statute in *Pennsylvania Fire*. 15 Pa. Cons. Stat. § 411.

Pennsylvania Fire Insurance Co. v. *Gold Issue Mining & Milling Co.* addressed a Missouri statute requiring an out-of-state insurance company to file a power of attorney "consenting that service of process" on a state official "be deemed personal service upon the company." 243 U.S. 93, 94 (1917). The Pennsylvania-based defendant complied. But when it was sued by an Arizona corporation on an

[2] The Surface Transportation Board may approve requests to discontinue rail operations only if it determines that abandonment or discontinuance is consistent with "the present or future public convenience and necessity." 49 U.S.C. § 10903(d). In applying that standard, the Board must balance the competing interests of the railroad, the affected shippers and communities, and interstate commerce generally. *See City of Cherokee* v. *Interstate Commerce Comm'n*, 727 F.2d 748, 751 (8th Cir. 1984); *Waterloo Ry. Co.—Adverse Abandonment*, 2004 STB LEXIS 280 at *9 (Apr. 30, 2004). In light of the devastating consequences on interstate commerce of a large railroad abandoning a significant part of its line, it is overwhelmingly unlikely that the Board would find the wholesale abandonment of all operations in a particular state to be consistent with the public interest.

insurance policy issued in Colorado, the nonresident defendant objected on due process grounds. This Court upheld the statute, explaining that such a law could support a valid suit because the nonresident corporation had expressly appointed an agent for service in any suit. Thus, *Pennsylvania Fire* underscored the appointment of an agent for service of process as the operative act that manifests valid consent to general jurisdiction. *Id.* at 96. Norfolk Southern never appointed an agent for service of process and, therefore, even if we rely on *Pennsylvania Fire* as Mallory urges, Norfolk Southern never consented to general jurisdiction, consistent with *Pennsylvania Fire*'s own reasoning. Because Norfolk Southern did not consent to general jurisdiction, the "relationship among the defendant, the forum, and the litigation" remains "central." *Shaffer*, 433 U.S. at 204. Pennsylvania's current assertion of jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny, as we have done. *Id.* at 212.

B

Now, even if we assume that Norfolk Southern complied with a statute that *did* require the appointment of an agent for service of process for general jurisdiction, a nonresident corporation's amenability to suit for claims unrelated to the forum through consent is not absolute. It is constrained by the constitutional limits on the State's power to extract consent. In fact, a corporation's consent to jurisdiction, obtained as a condition for conducting in-state business, may constitutionally extend only to the claims where the State has a sovereign interest

in the dispute. This sovereign interest requirement flows from original constitutional meaning and subsequent doctrine. Because *Pennsylvania Fire* holds otherwise in finding that a corporation's consent to jurisdiction extends to claims where the forum State has no legitimate sovereign interest, it must be overruled.

The Fourteenth Amendment's original public meaning supports a sovereign requirement. This Court's leading 19th-century case applying the consent doctrine, *St. Clair* v. *Cox*, 106 U.S. 350 (1882), made clear that the States' power to enact consent statutes was limited in application to suits that would arise out of a corporation's in-state business. This makes sense given the particular *Pennoyer*-era difficulty that registration jurisdiction originally sought to address.

Registration laws came about because early-1800s courts believed a corporation could "have no existence" beyond its state of incorporation, *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 519, 588 (1839), and could be sued only by serving its principal, who generally shed his official status when he left that state, *see St. Clair* v. *Cox*, 106 U.S. 350, 354 (1882). This made it essentially impossible to sue a corporation outside its place of incorporation and, as a result, impossible to secure to its citizens a remedy in their domestic forum. States sought to rectify this inequity by enacting the first agent-appointment statutes, requiring corporations desiring to conduct in-state business activities to stipulate to jurisdiction. After all, "it seemed only right" that a corporation "should be held responsible in [a state's] courts to obligations and liabilities *there incurred*." *St. Clair*, 106 U.S. at 355

(emphasis added). Thus, interest in fundamental fairness and respect for state sovereignty were guiding principles from the very beginnings of registration jurisdiction.

And for most of the 1800s, including when the Fourteenth Amendment was ratified, these registration laws remained cabined to the original problem they sought to address: allowing states to seek redress for in-state harms. Indeed, registration laws helped "secure to its citizens a remedy, in their domestic forum," for claims arising "within that State." *Lafayette Ins. Co.* v. *French*, 59 U.S. (18 How.) 404, 407 (1855). In the six decades between *Lafayette* and *Pennsylvania Fire*, this Court consistently emphasized this sovereign interest rationale, and apparently never allowed a suit that did not arise from the corporation's in-state business.

Pennsylvania Fire completely reversed course—forty-nine years after the Fourteenth Amendment was ratified—and held that Missouri could rely on consent to personal jurisdiction when it was a condition of doing business in the State, even when the suit was brought by a nonresident plaintiff against a nonresident insurer concerning out-of-state property. 243 U.S. at 94. The opinion by Justice Holmes rested on two now-repudiated premises: First, that the State has the power to "exclude foreign corporations altogether," *Flexner* v. *Farson*, 248 U.S. 289, 293 (1919), and second, that the power to exclude corporations altogether carries with it the lesser power to require them to consent to suit "as a condition of letting them in," *ibid.*

First, the Court has rejected the notion that a State has the power to "exclude foreign corporations altogether." *Flexner*, 248 U.S. at 293. The Court's modern cases treat carrying on interstate commerce as a "right" guaranteed by the Constitution, "not a franchise or privilege granted by the State." *Dennis* v. *Higgins*, 498 U.S. 439, 448 (1991). A State thus generally lacks the power to exclude nonresident competitors from its markets. *See Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2459-61 (2019). This makes *Pennsylvania Fire* inapplicable on its own terms.

Second, this Court also has abandoned Justice Holmes's view that the power to withhold a benefit includes the unlimited power to attach otherwise unconstitutional conditions. The Court has held in a variety of contexts that the Constitution limits the government's ability to require a person to give up a constitutional right to receive a benefit. *See, e.g.*, *Carson* v. *Makin*, 142 S. Ct. 1987, 1996 (2022); *Koontz* v. *St. Johns River Water Management District*, 570 U.S. 595, 604 (2013).). More specifically, it is now "well settled" that "the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution." *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 596 (1926). Any waiver or consent secured through such a condition has "no validity or effect." *Southern Pacific Co.* v. *Denton*, 146 U.S. 202, 207 (1892).

This Court's subsequent decisions during the 1920s after *Pennsylvania Fire* clarify *Pennsylvania Fire*'s reach. When registration alone, without accompanying

in-state business, was the sole jurisdictional hook for claims unconnected to the State, the registration statute, unless its language compelled otherwise, was not to "be construed to impose upon the courts of the State the duty, or give them the power, to take cases arising out of transactions so foreign to its interests." *Morris & Co.* v. *Skandinavia Ins. Co.*, 279 U.S. 405, 408-09 (1929). This Court was wary of construing state registration statutes "to extend to suits in respect of business transacted by the foreign corporation elsewhere, at least if begun . . . when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence." *Robert Mitchell Furn. Co.* v. *Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921).

These cases make clear that restrictions existed on consent under a registration statute when the statute itself furnished the only jurisdictional basis over claims "foreign to [State] interests." *Morris*, 279 U.S. at 409. The primary purpose of corporate registration-and-appointment statutes is to subject nonresident corporations to jurisdiction "in controversies growing out of transactions *within* the State." *Morris*, 279 U.S. at 409 (emphasis added). A corporation's consent to jurisdiction, obtained as a condition for conducting in-state business, may constitutionally extend only to the claims where the State has a sovereign interest in the dispute. Pennsylvania has no sovereign interest in the current dispute, and therefore, it may not constitutionally assert general jurisdiction over Mallory's out-of-state claims, even if we assume that Norfolk

Southern had provided valid consent to jurisdiction under Pennsylvania's corporate registration statute.

* * *

The Due Process Clause protects an individual's right to be subject only to a state court's lawful exercise of judicial power. As *International Shoe, Daimler,* and *Goodyear* each make clear, a defendant's general business activities in the forum do not entitle state courts to hear claims unrelated to the forum. This Court has held that defendants are subject to general jurisdiction only where they are "at home." For Pennsylvania courts to assert general jurisdiction here is to gut entirely these core legal precedents. But more importantly, allowing Pennsylvania to exercise jurisdiction here would amount to a rejection of an abiding and even more basic intuition about fundamental fairness which our current personal jurisdiction framework has come to embody.

A State has substantial sovereign interests in protecting its own residents. Yet Mallory's view would give that state's judges, jurors, and voters no role in deciding this dispute. Rather, based on its own understanding of consent jurisdiction by way of a registration statute, it would deny that state the ability to serve as the expositor of its own laws. *International Shoe*'s contacts-focused, "arise out of or relate to" approach and its sovereign interest rationale was certainly not the first to recognize this fundamental unfairness.

Under this Court's longstanding precedent, which includes ratification-era and early post-Fourteenth Amendment cases, registration statutes that confer consent jurisdiction over a nonresident corporation cannot be constitutionally applied unless the State has a sovereign interest in the suit. When a registration statute itself furnished the only jurisdictional basis over out-of-state claims, the jurisdictional conditions under registration statutes do not operate as consent. And here, Pennsylvania has no sovereign interest in the current dispute, and therefore, it may not constitutionally assert general jurisdiction over Mallory's out-of-state claims.

We hold that the Due Process Clause of the Fourteenth Amendment does not allow Pennsylvania courts to assert general personal jurisdiction over Norfolk Southern simply because it registers to do business in Pennsylvania, as required by state law. Accordingly, the judgment of the Pennsylvania Supreme Court is

Affirmed.